No. 90-56

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1989

MARGARITA ROSA DE CUELLAR,

Petitioner,

v.

NICOLAS F. BRADY, as SECRETARY OF THE TREASURY OF THE UNITED STATES

and

MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Since there are differing and conflicting opinions among the Circuit Courts of Appeals as exemplified by The Eleventh Circuit decision in De Cuellar v. Brady, Nos. 88-5606 and 88-5667 (11th Cir. Sept. 1, 1989) and the decisions of The Fifth Circuit in Real v. Simon, 510 F. 2d. 557 (1975) and Tagle v. Regan, 643 F.2d 1058 (1981) should The Court address this issue to harmonize and reconcile the inconsistencies between these decisions? This Honorable Court has never addressed the applicability of The Cuban Asset Control Regulations 31 C.F.R. Part 515 to the fundamental right of United States citizens/permanent residents claiming property interests in United States based assets presumably "blocked" by The Cuban Assets Control Regulations.

II. Has the Eleventh (11th) Circuit Court of Appeals, in De Cuellar v. Brady, Nos. 88-5606 and 88-5667 (11th Cir. Sept. 1, 1989), departed from the usual course of judicial proceedings by holding, in effect, that Defendant Secretary was Authorized by the Trading With The Enemy Act 50 U.S.C.A. App. § 1 et. seq. and the Cuban Asset Control Regulations promulgated thereunder, 31 C.F.R. Part 515 to take the private property interest of Petitioner, a United States permanent resident, for the purposes of "bargaining" with the Cuban Government and/or paying the claims of other Americans against Cuba for a period of time in excess of Twenty Seven (27) years without due process or just compensation?

III. Has the Eleventh (11th) Circuit Court of Appeals, in De Cuellar v. Brady, Nos. 88-5606 and 88-5667 (11th Cir. Sept.

1, 1989), departed from the usual course of judicial proceedings by holding that Defendant Secretary did not exceed his authority and act arbitrary and capricious in claiming that the plain language of General License 31 C.F.R. 515.524 is subject to the interpretation that "trusts" as used in said General License applies only to "Private" Trusts?

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CERTIFICATE OF INTERESTED PARTIES

I hereby certify that the following named parties have an interest in the outcome of this litigation.

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TABLE OF AUTHORITIES

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PARTIES WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. Secretary of the Treasury
   Mr. Richard Newcomb, Director
   Office of Foreign Assets Control
   Department of The Treasury

2. Honorable C. Clyde Atkins, Senior Judge
   United States District Court
   Southern District of Florida

3. United States Court of Appeals
   For the Eleventh Circuit

   i. Honorable Judge Peter Fay
   ii. Honorable Judge Joseph W. Hatchett
   iii. Honorable Judge Walter E. Hoffman

OFFICIAL OPINIONS DELIVERED

I. Department of Treasury denial of Petitioner's request for a General and/or Specific License, July 27, 1987. (See Appendix A).

II. De Cuellar v. Baker, 686 F. Supp. 890 (S.D. FL 1988) United States District Court Order Granting Plaintiffs Motion for Partial Summary Judgment. March 14, 1988. (See Appendix B).

III. De Cuellar v. Brady, Nos. 88-5606 and 88-5667 (11th Cir. Sept. 1, 1989), (See Appendix C).

JURISDICTION

The Petitioner seeks review of the opinion of the United States Court of Appeals for the Eleventh Circuit entered September 1, 1989 cited as De Cuellar v. Brady, Nos. 88-5606 and 88-5667 (11th Cir. Sept. 1, 1989) a copy of which is at **Appendix C.**

This Petition is timely filed pursuant to an Order of this Court granting an enlargement of time in which to file for Writ of Certiorari up to and including January 18, 1990. A copy of said Order is at **Appendix D.**

This Court has Original Jurisdiction pursuant to Article III Section 2 of The Constitution of The United States and 28 U.S.C. and Rule 17.1 (a) (c) of The Rules of The Supreme Court.

STATEMENT OF THE CASE AND FACTS

The Petitioner, Margarita Rosa De Cuellar, is the sole remaining beneficiary of a United States personal trust established in 1936 by her mother. The Trust Consists of One Hundred Twenty Seven (127) "Republic of Cuba External Sinking Fund 4 1\2 % Bearer Bonds" with a face value of $127,000.00 plus interest since maturity. These bonds were issued in 1937 under an indenture contract between the Republic of Cuba and Manufacturer's Hanover Trust (hereinafter referred to as "MHT"). Under the indenture agreement Cuba was to fulfill its obligation through annual payments of interest and principle into a sinking fund (hereinafter referred to as "The Sinking Fund") held by the indenture trustee, MHT, from 1937 through

1977. As trustee, MHT had many obligations among which was its responsibility to redeem these bearer bonds upon their maturity with the funds accumulated in the sinking fund.

Cuba made all required payments pursuant to the trust indenture until December 31, 1960, when it defaulted. On July 8, 1963 The Cuban Asset Control Regulations (hereinafter referred to as "The Regulations") were passed and the sinking fund was presumably blocked. As of that date MHT, the paying agent and trustee, held $640,000.00 in the sinking fund.[1]

On May 12, 1987, Petitioner filed an application with the Secretary seeking

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[1]. This figure was provided by MHT and has not been verified. Also, it is not clear whether this is the amount held presently or the amount blocked as of 1963.

either a specific license or a determination that general license 31 C.F.R. 515.524 applied and thereby entitled her to redeem her bonds with her distributive share of the sinking fund held by MHT. Her request was denied by Richard Newcomb, The Director of the Office of Foreign Assets Control ("OFAC")[2]. The Director stated that the Sinking Fund was blocked because the Republic of Cuba retained a "contingent reversionary interest" in the fund pursuant to Article 25 of the Indenture Contract [3] (See Article 25 at **Appendix E**).

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[2]. The President has delegated his authority under The Act to the Secretary of the Treasury, Executive Order No. 9193, 3 C.F.R. 1174, 1175 (1942) who in turn delegated that authority to the Office of Foreign Assets Control, Treasury Department Order No. 128 (Rev. 1 October 15, 1962).

[3] The indenture contract provides:

Six Years after the date of any

The Director claimed that Petitioner did not have an ownership interest but rather was a type of "secured creditor". Similarly, The Director found that the provision of General license 515.524 did not entitle Petitioner to redeem her bonds because 515.524 applies only to "personal trusts" and that she was not "legally entitled" to the bonds. See Copy of letter denying the application at **Appendix A.**

On September 1, 1987, Petitioner filed suit against The Secretary of the Treasury, and MHT, challenging: (i) The

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interest coupon the Agent shall return to the Republic of Cuba the amounts held for the payment of such interest coupons due on that date which shall not have been presented for payment. Similarly, six years after each redemption date, the Agent shall return to the Republic the amounts corresponding to those bonds called for redemption on that date, which shall not have been presented for payment....

Secretary's refusal to issue a specific license unblocking her trust interest (ii) The Secretary's refusal to declare the Cuban Asset Control Regulations inapplicable to Petitioner's redemption transaction and (iii) The Secretary's and Manufacturers Hanover Trust's refusal to give purpose or effect to General License Section 515.524 of the Cuban Asset Control Regulations 31 C.F.R. 515.

Petitioner invoked both federal diversity and federal jurisdiction over, respectively, Manufacturers Hanover Trust and The Secretary pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1332 and § 1361. Petitioner sought a declaratory judgment that the Republic of Cuba has no interest in the sinking fund and/or that the interest was so minimal as not to disturb the policy behind The Trading with the Enemy Act. Alternatively, Petitioner

sought a declaratory judgment that the General License provision 515.524 was directly applicable to her transaction and thus required no specific license.

On cross motions for summary judgment, the district court held that the trust fund qualified under the General License provision of 31 C.F.R. 515.524 and that Petitioner was "legally entitled to her distributive share as represented by her bonds". De Cuellar v. Baker, 686 F. Supp at 896. The district court granted partial summary judgment for Petitioner. Two days later the court determined that entry of partial summary judgment rendered the remaining issues moot and entered final judgment for Petitioner. The Secretary filed a request for a stay pending appeal on a motion for clarification, stating that it was not clear whether the court entered an

injunction against The Secretary. Petitioner requested a ruling that she was entitled to full redemption of her bonds, rather than her pro rata share of the fund. On April 15, 1988 the district court granted the Secretary's motion for clarification, and announced that the court's prior order was a declaratory judgment, and issued a stay pending appeal.

The Secretary filed notice of appeal July 13, 1988 and MHT filed notice of appeal July 19, 1988. Both appeals were from the Order Granting Plaintiff/Petitioners's Motion for Partial Summary Judgment. The Eleventh Circuit Court of Appeals has appellate jurisdiction pursuant to U.S.C. § 1291.

On September 1, 1989 The Court of Appeals found that the Secretary's denial of Petitioner's application was based

upon a reasonable interpretation of the Regulations and reversed the order of the district court and remanded for entry of judgment in favor of Respondents.

Petitioner filed a Motion for an enlargement of time in which to Petition this Honorable Court for Writ of Certiorari. On November 29, 1989 this Honorable Court granted said Motion for Enlargement up to an including January 18, 1989. See Order at **Appendix D.**

ARGUMENT IN SUPPORT OF WRIT

The instant case is in direct conflict with the decision(s) of the Fifth Circuit Court of Appeal in Real v. Simon, 510 F. 2d 557 (1975) and Tagle v. Regan, 643 F. 2d 1058 (1981). The Eleventh Circuit recognized that this case presents "a novel question concerning the interpretation of the Cuban Assets Control Regulations". See De Cuellar v. Brady, **Appendix C** at 66. However, the Eleventh Circuit's application of the law to the facts of this case not only caused Petitioner a grave injustice but went in direct contravention of the Fifth Circuit decisions in Real and Tagle. The facts of Petitioner's case presents a situation where the rationale of Real and Tagle, if correctly applied, would have lead to the inescapable conclusion that Petitioner was entitled to her United States based

property interests. The decision of the Eleventh Circuit Court of Appeals reversing the district court's granting of Petitioner's motion for partial summary judgment is effectively depriving Petitioner of her property without due process of law or just compensation.

An analysis of the Real and Tagle cases, in conjunction with the opinion of Eleventh Circuit in De Cuellar v. Brady, leads to the logical conclusion that they are inherently inconsistent decisions of two (2) circuit court of appeals pertaining to the same matter.

In Real, the Fifth Circuit decided that the U.S. Government, through the Department of Treasury, could not prohibit the heirs, United States residents, of a deceased Cuban National from collecting their inheritance from a securities account located in the United States. In

the Real case, the Fifth Circuit reviewed the application of The Regulations and held that the United States Government could not validly determine that deceased Cuban nationals retained an interest in an estate and that such a determination, by the Secretary, was arbitrary and without basis. Further, the Fifth Circuit held that the Treasury's refusal to issue a specific license was an unconstitutional deprivation of property without due process of law and granted appellants an unrestricted license to collect their inheritance from a brokerage firm maintaining frozen assets pursuant to The Regulations. Real at 559.

Similarly, in Tagle v. Regan, 643 F. 2d 1058 (5th Circuit 1981), a Cuban decedent's daughter, a United States citizen, and decedent's son, a permanent U.S. resident, brought suit challenging

the Secretary's refusal to issue a specific licence unblocking their intestate share of a Cuban decedent's United States Assets. The Fifth Circuit held that although the Cuban decedent and another heir, a Cuban national residing in Cuba, were "designated nationals" as defined in The Regulations, that the appellants were nevertheless entitled to their portion of the inheritance and thus entitled to a specific license from the Department of Treasury.

In the Real and Tagle opinions the Fifth Circuit reviewed, analyzed, and cited legislative history pertaining to the drafting of The Regulations. In Tagle, the Fifth Circuit specifically relied on the legislative history of The Trading with The Enemy Act. In Tagle, at 1061, the Court discussed the Senate Foreign Relations Committee discussions

pertaining to Cuban assets nominally held by defunct Cuban Corporations which are substantially owned by United States citizens. In Tagle, the Fifth Circuit concluded that the policy behind The Regulations, as discussed by The Senate Foreign Relations Committee, was specifically applicable to their facts. In Tagle, at 1062, the Fifth Circuit stated that

> "Since the use of assets beneficially owned by one United States Citizen to pay the claims of another was explicitly disapproved by Congress after a request from the Treasury for an expression of congressional views, we rejected The Treasury's rationale."

In Tagle, the Fifth Circuit cited and expanded the rationale of Real to include the right of United States residents/citizens to collect their interest in United States based assets even if a "designated national" still

retains an interest in said asset. (emphasis added) See Tagle at 1062.

Real and Tagle each stand for the proposition that United States residents/citizens are entitled to collect on their United States property interests. Petitioner, De Cuellar, maintains that The Secretary is interfering with this fundamental right. The Secretary cannot validly determine that Cuba retains an interest of enough significance in the sinking fund to justify depriving Petitioner of her contractual property interests without just compensation or due process of Law. Such a position by The Secretary and its adoption by The Eleventh Circuit in De Cuellar v. Brady is not supported by logic. See Real at 1061.

Here, as in Tagle and Real, there is no evidence (i) that Cuba has ever had an interest in the De Cuellar Estate (ii)

that De Cuellar, as sole surviving heir, has ever been a "national" or "designated national" of Cuba or (iii) that De Cuellar intends to use her share of the Sinking Fund for or on behalf of The Cuban Government.

Clearly, The Secretary has acted in an unreasonable and arbitrary manner and ignored Tagle and Real as well as the plain meaning of General License 31 C.F.R. § 515.524. In fact, at Page 39 of **Appendix A** O.F.A.C. Director Richard Newcomb's, letter in considering Tagle and Real, discards the rationale behind both these cases based on his determination that the "Tagle and Real precedents are far from being unanimously accepted by all the Circuit Courts" (See Appendix at A at Page 39). It is evident from Director Newcomb's analysis of case law on this matter that different Circuit Court of

Appeals have different opinions regarding the application of The Cuban Assets Control Regulations to similar factual situations as in Real, Tagle, and De Cuellar. Accordingly, it is only fitting and proper that this Honorable Court address this matter in order to clarify and reconcile this lack of unanimity among the Circuit Courts. It can be argued that The Secretary took advantage of these inconsistencies to wrongfully deny Petitioner her right to either a specific license or a declaration that General License 515.524 was directly applicable to her redemption transaction.

The Petitioner's entitlement to retire her bonds is specifically authorized by virtue of the grant of authority embodied in General License 515.524 which states, in pertinent part, as follows:

> Any Bank or Trust Company incorporated under the laws of the United States, or of any State, territory or district of the United States.....acting as Trustee of **any** trust administered in the United States.....in which trust or estate one or more persons who are nationals....have an interest beneficial or otherwise....is **hereby authorized** to engage in the following transaction:
>
> (i) Payment of distributive shares of principal and income to all persons legally entitled thereto.....(emphasis added).

Notwithstanding this clear grant of authority The Secretary insists that this provision was meant to apply only to "private" trusts even if the plain language of General License §515.524 says "any trusts". The absence of a definition of "trusts" in The Regulations, coupled with such a broad provision as "any trust", flies in the face of The Secretary's contention that it applies

only to "private" trusts. Such a determination by The Secretary should have been found by the Eleventh Circuit Court of Appeals to be an unreasonable, arbitrary, and capricious finding as it was by the district court in De Cuellar v. Baker, and the Fifth Circuit in Real and Tagle.[4]

The district court held that the vehicle of General License §515.524 specifically permitted the redemption of Petitioner's distributive share from the indenture trustee, Manufacturer Hanover Trust. The district court, through Senior

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[4]. It should be noted that the Honorable Clyde Atkins was the trial Judge in Tagle v. Regan. He was reversed by the Fifth Circuit for finding in favor of The Secretary and against the Cuban heirs of the deceased Cuban national. Undoubtedly, he considered his earlier reversal in deciding De Cuellar v. Baker, only to be subsequently reversed by The Eleventh Circuit for finding in favor of the Cuban heir and against The Secretary in a similar factual scenario.

Judge, Clyde Atkins, agreed that General license 515.524 was directly applicable to Petitioner's redemption transaction and held that:

> "Section 515.524 comports with the general philosophy of the regulations without impairing the property interest of Americans. A device has been fashioned to implement that philosophy, specifically the general license of Section 515.524, and it should be employed to its intended purpose when, as here, it may be done without impeding or interfering with foreign policy" De Cuellar v. Baker, 686 F. Supp. 890 at 895 (S.D. Fla 1988).

The district court, in so holding, disagreed with the Secretary's assertion that General License Section 515.524 was intended to apply only to private trusts and not to those established by governmental entities and administered by a private U.S. based trust company.

In De Cuellar v. Brady, the Eleventh (11th) Circuit Court of Appeals reversed

the district court, based on de novo review of the court's decision, that the Secretary's denial of the Petitioner's application was based upon a reasonable interpretation of The Regulations.

Although the Eleventh Circuit Court of Appeals addressed the Real and Tagle decisions the court found these to be distinguishable from the Petitioner's case. In particular, The Court found that these cases essentially stand for "the broad proposition that under the act, there is no suggestion that assets passing to Americans should be restricted in any way." Tagle at 1065 and De Cuellar v. Brady, Nos. 88-5606 and 88-5667 at pg. 4149. See Appendix C. Pg. 89

The Eleventh Circuit in De Cuellar noted the similarities between this case and Tagle. In Tagle one of the three surviving heirs was a resident of Cuba and

thus a "designated national" under The Regulations who clearly retained an interest in the estate. Presumably, the Eleventh Circuit, in De Cuellar v. Brady, found it necessary to discuss the rationale of unblocking assets of United States residents even though a designated national retained an interest because, in this case, Cuba arguably maintains a contingent reversionary interest in the sinking fund pursuant to Article 25 of the indenture contract. However, the Eleventh Circuit Court held Tagle distinguishable based on its interpretation that in Tagle the appellant's intestate shares could be "sufficiently separated and identified" and that Regulation 515.525 authorizes the appellants in Tagle to take their shares even though ten shares of the Cuban heir remained blocked. See De Cuellar v. Brady at page 4149. See Appendix C, Pg. 92.

The Eleventh Circuit in De Cuellar v. Brady never pursued Tagle's argument to its logical conclusion as applied to the case subjudice. That is, that Cuba's contingent reversionary interest could likewise remain blocked and undisturbed notwithstanding Petitioner, De Cuellar's redemption of her corresponding interest in the One Hundred Twenty Seven (127) Bonds.

In agreeing with The Secretary's determination, and concluding that Cuba's contingent reversionary interest was sufficient to block the entire fund, The Eleventh Circuit reached a conclusion directly contrary to the decision of the Fifth Circuit in both Real and Tagle. Moreover, the Eleventh Circuit failed to address, by omission, and/or by erroneous analogy, certain points necessary to reach the conclusion which it ultimately

reached. Specifically, the Court in De Cuellar did not discuss Cuba's entitlement to any interest at all in light of its default in 1960. Secondly, the Court analyzed this case as a-kin to those cases involving corporate stock or securities when, in fact, bearer bonds are by their very nature, existing contractual obligations which are severable and independent. Thus, the Eleventh Circuit Court of Appeals application of Nielsen v. Secretary of Treasury, 424 F. 2d 833 (DC Cir 1970) in this context, is misplaced.

The assertion by the Secretary, and its adoption by the Eleventh Circuit Court of Appeals in De Cuellar, that some bonds are outstanding and thus she is not entitled to any of her bonds is clearly erroneous and oppressive. The question of outstanding bonds held by other unknown persons is irrelevant to this redemption

transaction because it would be impossible for any person to redeem their bonds in the absence of either a general or specific license which **must** be issued by The Secretary, through the Office of Foreign Assets Control. Accordingly, the granting of Petitioner's general license shall not automatically allow all others in possession of these bonds to redeem same from MHT unless they fit the criteria established by The Regulations.

The direct conflicts between the decision in this case and those of Real and Tagle cannot be distinguished away as The Eleventh Circuit attempts to do. Given the grant of authority in General License C.F.R. 515.524, the severability of Petitioner's bearer bonds, Cuba's marginally minimal interest in the Sinking Fund by virtue of its contingent reversionary interest, the unequivocal

case law in support of Petitioner's position as expressed in Real and Tagle, and the clear legislative history as discussed in those cases, the Circuit Court of Appeals for the Eleventh Circuit should have decided in a manner not inconsistent with the intent of congress, and judicial precedent. Accordingly, Petitioner seeks review by this Honorable Court in order to clarify and reconcile the inconsistencies between Real and Tagle, congressional intent as expressed in General License 515.524, and De Cuellar v. Brady.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Writ of Certiorari was mailed to all parties on the Certificate of Interested Parties this 2nd day of July, 1990.

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APPENDIX "A"

OPINION DEPARTMENT OF TREASURY OFFICE OF FOREIGN ASSETS CONTROL

July 27, 1987

FAC No. 105357

Dear Mr. Arandia:

I am writing in response to your May 12, 1987 application pursuant to the Cuban Assets Control Regulations, 31 C.F.R. Part 515 ("the Regulations") and as a follow up to our meeting of June 22, 1987.

In the May 12, 1987 application your client, Mrs. Margarita Cuellar-Zayas, requested a license unblocking $126,000 of a sinking fund account held by Manufacturers Hanover Company in New York. The $126,000 represents the face amount of certain Republic of Cuba External Sinking Fund bonds inherited by Mrs. Cuellar-Zayas which were issued in 1937, sold on the U.S. market, and matured in 1977 ("the

1937-1977 bonds"). As is customary with bonds sold by a public authority on a foreign market, several sinking funds were established in the United States to ensure that various payments were made with respect to the bonds. A contract ("the Trust Indenture") was executed between Cuba and Manufacturers Trust Company whereby Manufacturers Trust Company ("the Trustee and Fiscal Agent") was appointed the trustee and fiscal agent of the Republic of Cuba for the purpose of holding and managing these funds.

Pursuant to Article 12 of the Trust Indenture, the Republic of Cuba was obligated to make regular payments into a sinking fund held by the Trustee and Fiscal Agent, beginning in 1938 and continuing until 1977. These payments were fixed in amount sufficient to retire the bonds, if they were called by Cuba prior

to the maturity date, and were designed to accumulate in an amount sufficient to retire the bonds upon their maturity in 1977. Under article 25 of the Trust Indenture, Cuba retained a reversionary interest in the sinking fund, as the trustee and Fiscal Agent was required to return to Cuba any amounts unclaimed by bondholders within six years after the maturity date of June 30, 1977.

Cuba made the deposits required by the Trust Indenture from 1938 until December 31, 1960. On July 8, 1963, the sinking fund was blocked pursuant to the Cuban Assets Control Regulation, 31 C.F.R. part 515 ("the Regulations").

Mrs. Cuellar-Zayas makes three arguments in support of her application to unblock. First, she contends that the Republic of Cuba lost all interest in the money paid into the sinking fund trust account, and

thus that no national of Cuba retains an interest in those funds. Consequently, she asserts, this office has no basis for continuing to block them. As a corollary she argues that she has a vested ownership interest in the fund in an amount equal to the face value of her bonds. Second, she argues that failure to unblock would be an unconstitutional impairment of the contract between Cuba and the Trustee and Fiscal Agent, of which contract she is a beneficiary. Third, she states that a failure to unblock would result in Cuba's benefiting from its own illegal act of expropriation, i.e., its default on the bonds.

In this case the settlor, the Republic of Cuba, reserved a contingent reversionary interest in itself with respect to any funds left over six years after the date of maturity of the 1937-1977 bonds.

"Property interests" and "interests" subject to the blocking order of section 515.201 (b) (1) of the Regulations are defined very broadly in sections 515.311 and 515.312, respectively, to include any property, tangible or intangible, present, future, or contingent, and any interest of any nature whatsoever, direct or indirect. A reversionary interest similar to Cuba's was found sufficient, in Behring International, Inc. v. Miller, 504 F.Supp. 552 (D. N. J. 1980), to warrant blocking for the duration of the Iranian embargo a trust fund established for the benefit of Behring by the Iranian Imperial Air Force in order to maintain the status quo while the President negotiated with Iran for the release of U. S. hostages.

The decision in Behring comports with the rules of trust ownership and administration, which provide that where

the trustee holds a fund representing the unclaimed balance of distributions due unknown bondholders, the interest of the unknown bondholders in the fund are several and should not be turned over to the known bondholders as a class. Mayer v. Chase National Bank, 233 F.2d 468, 471 (2d Cir. 1956). For this office to license the pay-out of the claim of the present applicant without accounting for the claims of all other bondholders, their heirs, and the Republic of Cuba as remainderman would violate our duty to manage blocked funds fairly and in accordance with the applicable law. It is unlikely that the sinking fund contains enough money to pay off all claims against it, as Cuba ceased making payments into it 17 years prior to maturity of the bonds, which further increase the problems inherent in attempting to pay off the

claimants to the fund in advance of a general settlement and unblocking of Cuban assets.

For these reasons, we have concluded that there would appear to be no merit to Mrs. Cuellar-Zayas's claim that the Republic of Cuba has an insufficient interest to support a blocking under the Regulations. Turning to an examination of Mrs. Cuellar-Zayas's interest, we note that bondholders have a promise to pay from the issuer, but no corporate ownership privileges, as stockholders do. This is an important distinction, as it indicates that Mrs. Cuellar-Zayas is not an owner of the Republic of Cuba sinking fund; rather, she has the position of a secured creditor, and is only one among many such creditors with respect to this particular fund. As a secured creditor, she does not qualify for the general license of section 515.524

of the Regulations. This section provides that persons "legally entitled thereto" may receive payment of their distributive shares of principal or income in any trust in which a national of Cuba has an interest. The Trust Indenture did not provide for the vesting of legal title in the bondholders upon maturity of the bonds. Instead, it merely established a secured pool of funds out of which the claims of these creditors could be satisfied. Thus Mrs. Cuellar-Zayas is not "legally entitled" to the funds upon maturity, although she does have a preferred claim against them. In this respect the trust may be distinguished from the more typical private trust where provision is generally made for the distribution of fixed percentages of principal upon the termination of the trust. Moreover, even if your client could

be set to be acquire legal title upon the termination of the trust, such termination is itself a prohibited transaction due to the Republic of Cuba's remainder interest. Mrs. Cuellar-Zayas also claims that the blocking is an impairment of the contract between Cuba and Manufacturers Hanover, presumably in violation of the contract clause, U.S. Const. art. I, section 10. However, her reliance on this provision is misplaced, as it applies only to actions of state governments, not those of the federal government. Pension Benefit Guaranty Corporation v. R.A. Gray & Company, 467 U.S. 717, 732 n.9 (1984).

A more usual constitutional claim raised with respect to federal blocking powers is that they constitute a governmental taking of private property without just compensation in violation of the due process clause, U.S. Const. amend. V. A

long line of cases has upheld the viability of Presidential freeze orders. See, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981); Tran Qui Than v. Regan, 658 F.2d 1296 (9th Cir. 1981); Tole v. Miller, 530 F. Supp. 999 (S.D.N.Y. 1981); Nielsen v. Secretary, 424 F.2d 833 (D.C. Cir. 1970); Sardino v. Federal Reserve Bank of New York, 361 F. 2d 106 (2d Cir. 1966); Propper v. Clark, 337 U.S. 472 (1949). Based upon these precedents upholding the constitutionality of blocking orders in general and the Cuban assets freeze in particular, we conclude that the blocking of the sinking fund, in which Cuba retains a reversionary interest, is not a taking of property without just compensation.

We also note that Mrs. Cuellar-Zayas contends that the blocking order permits Cuba to benefit from its illegal

expropriation. This argument was raised and rejected in Tran Qui Thanh v. Regan, cited above.

You have also asked Kathryn Mann of the Legal Section to consider the effect of the legislative history concerning Pub. L. No. 89-262, 79 Stat. 988, which is discussed in the cases Real v. Simon, 510 F. 2d. 557 (5th Cir. 1975) and Tagle v. Regan, 643 F.2d 1058 (5th Cir. 1981). A house report on the proposed amendment, which sought to unblock U.S. assets of Cuban corporations, suggested that Treasury determine on a case-by-case basis, from the evidence and equities involved, the nature of the interest in each blocked asset, and that it unblocked U.S. privately-owned assets where proper. However, it should be noted that Congress limited itself to expressing its concern, and did not amend the International Claims

Settlement Act as requested to unblock Cuban corporate assets. In addition, as the court for the Second Circuit of Appeals in Richardson v. Simon, 560 F.2d 500 (2d Cir. 1977) noted, relying on the opinion of Congress in 1956 to discern Congressional intent with respect to the Trading With the Enemy Act in 1941 is very risky. The Richardson court refused to unblock estate assets where the only Cuban interest was that of the decedent, and thus the Tagle and Real precedents are far from being unanimously accepted by all the circuit courts.

We have gone into considerable detail to provide you with background on the regulations and policies administered by this office which are relevant to our licensing decision in this case. Based on all the considerations discussed above, we must adhere to our initial decision

denying Mrs. Cuellar-Zayas a license to unblock a portion of the sinking fund. Please let us know if you have any further questions.

Sincerely,

R. Richard Newcomb
Director
Office of Foreign Assets Control

Alexander Arandia, Esq.
Arandia & Perez, P.A.
4008 Aurora Street
Coral Gables, Florida 33146

APPENDIX "B"

Margarita Rose DeCUELLAR.Plaintiff

v.

James A. BAKER, as Secretary of the Treasury of the United States, and Manufacturers Hanover Trust Company, Defendants.

No. 87-1622-Civ.

United States District Court, S.D. Florida.

March 14, 1988.

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

ATKINS, District Judge.

THIS CAUSE is before the court on plaintiff's motion for partial summary judgment and on the defendants' cross motions for summary judgment and motions to dismiss. After careful consideration of all submitted papers and after a hearing, it is

ORDERED AND ADJUDGED that the plaintiff's motion for partial summary judgment is

GRANTED, and the defendants' motions for summary judgment and motions to dismiss are DENIED.

The plaintiff, a Cuban refugee residing in Florida, was the sole remaining beneficiary of a United States personal trust, the corpus of which consisted of One Hundred Twenty Seven Thousand Dollars ($127,000.00) principal face amount of Republic of Cuba External Sinking Fund 4 1/2 Bearer Bonds of 1937 due 1977. The bonds were issued in 1937 under an indenture contract between the Republic of Cuba and Manufactures Hanover Trust ("MHT"). The Republic of Cuba agreed to make payments of principal and interest on the bonds to the indenture trustee, MHT. in trust for the bondholders. Until 1960 when Cuba defaulted on its obligation, all payments were made to the New york offices of MHT, the indentured

trustee. MHT currently holds the sinking fund.

On May 12, 1987, the plaintiff filed a petition seeking a specific license authorizing the liquidation of the assets of the trust. The plaintiff's requested was denied by Richard Newcomb, director of the Office of Foreign Assets Control ("OFAC") on July 27, 1987. OFAC found that the Republic of Cuba's contingent reversionary interest[1] was sufficient to

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[1] The indenture contract provided that: Six years after the due date of any interest coupon the agent shall return to the Republic the amounts held for the payment of such interest coupons due on that date which shall not have been presented for payment. Similarly, six years after each redemption date, the agent shall return to the Republic the amounts corresponding to those Bonds called for redemption on that date, which shall not have been presented for payment....
Agreement at $25.
At least one court has also found "Cuba, the 'designated national' has had an interest in the bonds within the meaning of section 515.312, as it is the obligor

support blocking the fund under the Cuban Assets Control Regulations, 31 C.F.R. Sec. 515.201(b). The office characterized Mrs. De Cuellar's interest as that of a secured creditor and decided that, since she was not "legally entitled"to her distributive share, she did not qualify under the general license provision of 31 C.F.R. Sec. 515.524.[2]. For the purpose of this

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on these debts, which fall explicitly within the definition of 'property' set out in 31 CFR 515.203(f)." See Lary v. Republic of Cuba, 643F.Supp. 194, 196 (S.D.N.Y.1986). But Lary did not explore the applicability of the general license of Sec.515.524 to this fund. That case was concerned with a transfer between holders of the bearer bonds, a transaction that falls squarely within the proscription of Sec. 515.201 and is not excepted by a general license section.

[2]. Sec. 515.801 provides for certain general licenses "authorizing under appropriate terms and conditions, many types of transactions which are subject to the prohibitions contained in Subpart B." Those general licenses are set out in Subpart E of the regulations. Sec. 515.524 is an example of such a general license. It excepts those person "legally

motion which asserts the applicability of the general license of section 515.524, the court assumes that the transaction in question is prohibited by the regulations and specifically by section 515.201(b).[3]

The plaintiff filed this action challenging OFAC's refusal to apply section 515.524 of the regulations to her transaction, OFAC's refusal to declare the

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entitled" to a distributive share of a qualified trust.

[3]. Sec. 515.201(b):
All of the following transaction are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, ruling, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:
(1) All dealings in, including , without limitation, transfers, withdrawals, or exportations of, any property or evidence of indebtedness....

regulations wholly inapplicable to her transaction, and OFAC's refusal to issue a specific license authorizing the transaction.[4] The plaintiff's complaint seeks a declaratory judgment that the Republic of Cuba has no interest in the sinking fund or in the bonds, an order in the nature of mandamus compelling the Secretary of the Treasury to grant the

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[4]. Specific license are controlled by Sec. 515.801(b):
Transactions subject to the prohibitions contained in Subpart B of this part which are not authorized by general license may be effected only under specific license. The specific licensing activities of Foreign Assets Control are performed by the central organization and the Federal Reserve Bank of New York. When an unusual problem is presented, the proposed action is cleared with the Director of the Office of Foreign Assets Control or such person as he may designate.
The regulations provide, however, that it is "the policy of the Office of Foreign Assets Control not to grant applications for specific licenses authorizing to which the provisions of an outstanding general license are applicable. 31 C.F.R. Sec.515.801(a).

plaintiff a specific license allowing her to redeem her bonds with the corresponding pro rata share of the fund, and an order compelling MHT to comply with the license.

The plaintiff's motion for partial summary judgment alleges that her transaction has been expressly authorized by the general license of 31 C.F.R. Sec. 515.524. This court agrees.

Under Fed. R. Civ. P. 56 (a), summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law." The Supreme Court has interpreted Rule 56(c) as mandating entry of summary judgement after "a sufficient time for discovery and upon motion, against a party a party who fails

to make a showing sufficient to establish the existence of an element essential to that party's case, and upon which the party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 106 S. Ct. 2552-53(1986). Although the moving party bears the burden of informing the court of the basis of its motion, see id. at 2553, the opposing party is not relieved of the burden of producing evidence that would support a jury verdict. In Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2514 (1986), the supreme Court found that Rule 56(e) provides that "party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial."

The instant case is governed by the Cuban Assets Control Regulations, 31 C.F.R. Sec. 515.101-901 promulgated in July of 1963 and authorized first by the Trading with the Enemy Act, 50 U.S.C. App.Sec. 1 et seq. and then by the International Emergency Economic Powers Act of 1976, 50 U.S.C. Sec. 1702(a) (1) (B). The plaintiff does not challenge the validity of the regulations.[5] The regulations prevent the transfer of "any property or evidences of indebtedness," see Sec 515.201(b) (1), if such transactions involve "property in which any foreign country designated under this part, or any national thereof, has any

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[5]. It is well established that the regulations are valid and enforceable. See, e.g., Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355 (11th Cir. 1984): Tagle v. Regan, 643 f. 2d 1059 (5th Cir. 1981); Real v. Simon, 510 F.2d 557 (5th Cir. 1975); Ferrera v. United States, 424 F. Supp. 888 (S.D. Fla. 1976).

time on or since the effective date of this section had any interest of any nature whatsoever," see Sec. 515.201(b), and prohibited all financial and commercial transactions between United States nationals and Cuban nationals without authorization from the Secretary of the Treasury. These regulations, however, contain certain express exceptions or general license of which section 515.524 is one. That section reads:

(a) Any bank or trust company incorporated under the laws of the United States, or of any State, territory, or district of the United States, or any private bank subject to supervision and examination under the banking laws of any States of the United States, acting as trustee of any trust administered in the United States or as legal representative of any estate of an

infant or incompetent administered in the United State in which trust or estate one or more persons who are nationals of a designated foreign country have an interest, beneficial or otherwise, or are co-trustees or co-representatives, is hereby authorized to engage in the following transactions:

(1) Payments of distributive shares of principal or income to all persons legally entitled thereto. . . .

The defendants argue that this section was meant to apply only to private trusts and not to those established by a governmental entity. In addition, they argue that if the trust in question is susceptible to the license authorized by that section, OFAC determined that the plaintiff is not "legally entitled" to her distributive share as required by section 515.524(a) (1) and the fund must remained

blocked. The defendants remind the court that the decision of OFAC finding that Mrs. De Cuellar is not "legally entitled" to a distributive share is due great deference and should be reversed only if arbitrary or capricious. See, e.g., Parker v. Bowen, 788 F.2d 1512, 1518 (11th Cir. 1986) (agency's interpretation of its regulations entitled to great deference).

The plain words of section 515.524 belie the defendants' contention that it should be applied only to private trusts. That section excepts "any trust administered in the United States." The sinking fund clearly meets the qualification of a trust administered in the United States. In fact, the parties do not dispute this point. While it is true that the title of the section pertains to "payment from, and transactions in the administration of certain trust and

estates," (emphasis added), the limitation requires that the trust be administered by a "bank or trust company incorporated under the laws of the United States, or of any State...or any private bank subject to the supervision and examination under the banking laws of any State of the United States." Hence the movant has satisfied the directive of the Supreme Court in Celotex, 106 S. Ct. 2548 by informing this court of the basis for its motion, reliance on section 515.524 because the trust in question is administered in the United States by a qualified bank.

In opposing the plaintiff's motion, the defendants merely assert that "[t] he agency has interpreted this section as applying to private trusts and not to public funds established by foreign government," see Defendant James A. Baker's Memorandum in Support of Motion to

Dismiss, or in the Alternative for Summary Judgment, and in Opposition to Plaintiff"s Motion for Partial Summary Judgment at 6, a "mere allegation[s] or denial[s]" insufficient to prevent entrance of summary judgment. See Anderson, 106 S.Ct. at 2514. In fact, in a letter dated July 27, 1987, in which the director of the Office of Foreign Assets Control detailed the rationale behind the rejection of Mrs. De Cuellar's claim, the agency never stated that the trust was not subject to the terms of section 515.524. The basis for OFAC's refusal to apply this section lay in the fact that it characterized Mrs. De Cuellar's interest in the fund as that of a secured creditor, see FAC No. 105357 at 3, and stated that such an interest did not place her in the position of one "legally entitled thereto" as required by

section 515.524 (a) (1). [6] Furthermore, section 515.305 defines designated national for the purpose of the regulations to include "Cuba and any national thereof." (emphasis added). Section 515.524 (a) excepts any trust in which "one or more persons who are nationals of a designated foreign country have an interest." The regulations in general, and Subpart B in particular, make no distinction between "the designated foreign country or any nationals thereof," and there is no basis to suppose that Subpart E, which generally excepts certain transactions from Subpart B restrictions, would do otherwise, absent an explicit directive.

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[6]. Sec. 515.524 (a) (1) allows payment of distributive shares from a trust qualifying under Sec 515.524 (a) to "all persons legally entitled thereto upon the condition prescribed in paragraph (b) of this section."

The philosophy of the regulations does not dictate against application of this general license to this trust. In fact, the trend of current case law supports such an action.[7] The motivation behind promulgation of the regulations has been described as threefold: (1) to deny Cuba and/or its nationals the use of hard currency with which to promote activities inimical to the interests of the United States, (2) to retain blocked funds for possible use by or vesting to the United States, and (3) to employ funds as a basis for negotiation with the Cuban government.

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[7]. In Tagle v. Regan, 643 F. 2d at 1058. 1065 (5th Cir. unit B 1981) the Fifth Circuit pointed out that "the Trading With the Enemy Act as originally conceived was designed to cause as little disruption as possible to normal relations with enemy aliens, consistent with the aim of keeping assets out of enemy hands. There is no suggestion that assets passing to Americans should be restricted in any way." (emphasis added).

See Tagle v. Regan, 643 F.2d at 1065 (quoting 55 Cong. Rec. 4858 (1917)); Real v. Simon, 510 F.2d 557, 563 (5th Cir. 1975) (citing Department of State Press release 360, July 8, 1963, Dept't of State Bull. 160 (1963).

It was not suggested that the plaintiff, a Cuban refugee and American resident, intends to employ the funds on behalf of the Cuban government. See, e.g., Real, 510 F. 2d at 563 (no contention advanced that appellant intended to use the account to benefit Cuba). The plaintiff is a refugee who fled that country over twenty years ago. Nor can it be said that the plaintiff's distributive share may be used by the United States to satisfy claims of Americans against the Cuban government. The Senate Foreign Relations Committee, concerned with the possible appropriation of American owned

assets, opined, "if the asset are wholly owned or substantially owned by citizens and residents of the United States they should be unblocked, since it is possible that such assets may be placed in a fund at some future date and used to pay the claims of American citizens against the Cuban government. This would be tantamount to using the property of one U.S. citizen to pay the claim of another U.S. citizen." S.Rep.No.701, 89th Cong., 1st Sess. (1965), U.S. Cong. and Admin. News, pp. 3581, 3583. See also Tagle, 643 F.2d at 1066 (no warrant in the Act for any attempt by the Treasury to use assets which properly belong to Americans to compensate other Americans); Real, 510 F.2d at 563 (clear direction from Congress of no intent to use property of one American to pay another). Thus neither purpose is served by continued blockage of

this fund and the only national interest that may be advanced is use of the Republic's interest by the United States for negotiation purposes.

This court recognizes the importance of providing the President with flexibility in his negotiations with the Cuban government and that Cuba's contingent interest may prove to be a valuable bargaining tool sometime in the future as argued by the defendants. However, the United States may only use those assets that are not the property of American residents because, just as there is no basis for allowing the use or property of an American to satisfy the claim of a designated foreign country.

The general license of section 515.524 provides a mechanism through which to satisfy the plaintiff's interest without releasing foreign assets and

thereby respecting the goals of the regulations. That section allows "[a]ny payment or distribution of any funds, security or other choses in action to a national of a designated foreign country under this section shall be made by deposit in a blocked account in a domestic bank in the name of the national who is the ultimate beneficiary thereof." See 31 C.F.R. Sec. 515.524 (2) (b). Therefore should it be determined that any national of the designated foreign country, Cuba is entitled to a pro rata distribution, or that Cuba's contingent reversionary interest becomes vested, such payments shall be made into a blocked account pursuant to the mandate of section 515.524 (2) (b). The general license of section 515.524 provides the means through which to satisfy the property claims of American

residents without threatening the goals of foreign policy.

The court now turns its attention to OFAC's determination that Mrs. De Cuellar is not "legally entitled" to her distributive share of the fund and refusal to apply the general license section permitting payment or distribution. This court believes that such a point of view requires an unduly restrictive definition of the term "legally entitled" and does not comport with the spirit of the indenture contract or the legal rights of a holder or bearer bonds. The OFAC would interpret "legally entitled" as meaning that Mrs. De Cuellar must have "legal title" before she comes under the umbrella of section 515.524. See FAC No. 105357 at 4 ("even if your client could be said to acquire legal title"). Legal Title is "[o]ne cognizable or enforceable in a

court of law, or one which is complete and so far as regards the apparent right of ownership and possession, but which carries no beneficial interest in the property, another being equitably entitled thereto...." See Black's Law Dictionary 1042 (4th ed. 1968). The very word of section 515.524 state that it applies to "any trust or estate in which one or more persons who are national or a designated foreign have an interest, beneficial or otherwise...." (emphasis added). The indenture agreement provides that the bonds "constitute irrevocable and indisputable contract obligations," see Agreement at Par. 7, and that they "shall be entitled to and shall have the benefits of a Sinking Fund sufficient to retire, by redemption or by purchase... all such bonds...." Agreement at Par. 12. The more correct interpretation, then, would be to

find" legally entitled" to mean one who has a legal right, a right "created or recognized by law." Black's Law Dictionary 1042 (4th ed. 1968). As the holder of the bearer bonds, Mrs. De Cuellar has a legal right to enforce the irrevocable, indisputable contract obligations represented by the bonds and is entitled to the pro rata benefits of the Sinking Fund sufficient to redeem those bonds.

Finally, section 515.524 comports with the general philosophy of the regulations which seek only to prevent assets from reaching a hostile government without impairing the property interests of Americans. A devise has been fashioned to implement that philosophy, specifically the general license of section 515.524, and it should be employed to its intended purpose when, as here, it may be done

without impeding or interfering with foreign policy.

It is true that when reviewing a decision of a Secretary of the Treasury to deny a license to unblock funds, this court's scope of review is narrow. It is limited to a determination of whether OFAC decision was unreasonable, arbitrary, capricious of contrary to law. Behring International, Inc. v. Miller, 504 F. Supp. 552, 556 (D. N.J. 1980). OFAC's determination that Mrs. De Cuellar was not "legally entitled" to the distributive share as represented by her bonds was based upon as unreasonable, arbitrary interpretation of "legally entitled" that misconstrues the legal term of art "legal title." The fact that the Trust Indenture did not provide for the vesting of the "legal title" in the bondholders is not determinative of whether a bondholder has

a legal right to enforce the contractual obligations specifically outlined by the Trust Indenture. This order does not consider OFAC's decision to deny a specific license to the plaintiff because, as noted above, it is OFAC's policy not to grant a specific license to a transaction that is excepted from the regulations by a general license.

For the reasons recited, it is this court's determination that the Sinking Fund is a trust within the meaning of section 515.524 and the plaintiff, Margarita De Cuellar is "legally entitled" to the distributive share as represented by her bonds.

DONE AND ORDERED at Miami, Florida, this 13th day of March, 1988.

CLYDE ADKINS
UNITED STATES DISTRICT COURT JUDGE

cc: Alexander Arandia
Stephen Murphy
Julian Kreeger

APPENDIX "C"

Margarita Rosa DE CUELLAR,
Plaintiff-Appellant,
v.
Nicholas F. BRADY as Secretary of the Treasury of the U.S. and Manufacturers Hanover Trust Company, Defendants-Appellees,

Margarita Rosa DE CUELLAR,
Plaintiff-Appellee,

v.

Nicholas F. BRADY as Secretary of the Treasury of the U.S. and Manufacturers Hanover Trust Company, Defendants-Appellants.
Nos. 88-5606, 88-5667.

United States Court of Appeals,
Eleventh Circuit,

Sept. 1, 1989.

FAY, Circuit Judge:

This appeal presents a novel question concerning the interpretation of the Cuban Assets Control Regulations, 81 C.F.R.Part 515 (1987). The plaintiff a Cuban refugee residing in the United States, brought this suit seeking a writ of mandamus

ordering the Secretary of the Treasury to issue her a licence to redeem certain bonds issued by the Republic of Cuba. The Secretary, through the Office of Foreign Assets Control, had denied her application for a licence stating that the redemption of her bonds was blocked under the Cuban Assets Control Regulations. The district court held that the sinking fund securing the bond issue qualified as a trust, and the plaintiff was therefore entitled under the Regulations to a general licence to redeem the bonds. De Cuellar v. Baker, 686 F. Supp. 890 (S.D.Fla.1988) We find that the Secretary's denial of the plaintiff's application was based upon a reasonable interpretation of the Regulations and accordingly we reverse the order of the district court.

I

The statutory basis for the Cuban Assets Control Regulations ("the Regulations") is the Trading with the Enemy Act ("the Act"), 50 U.S.C.App. Sec.1 et seq. Section 5(b) of the Act provides in part:

During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate...

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution...and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation

of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national therefore has any interest.... In 1977 Congress amended Sec. 5(b) so that its applicability no longer extended to national emergency situations during peacetime. Act of December 28, 1977, Pub. L.No. 95-223, 91 Stat. 1625 (1977).[1] Section 101(b) of the Act however, contained a grandfather clause such that economic measures taken pursuant to Sec. 5(b) prior to 1977 could be continued. "The President may extend the exercise of such authorities for one-year periods upon

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[1]. The President"s power to take economic measures in peacetime is now governed by the International Emergency Economic Powers Act. Pub.L. 201 et seq., 91 stat. 1626 (codified in U.S.C. Sec. 1701 et seq.), which permits presidential action with respect to foreign property in an emergency declared by the President.

a determination... [that such] extension... is in the national interest of the United States." The Regulation have been extended each year.

In 1963 President Kennedy issued an embargo on all trade with Cuba. Under the authority given to him under the embargo, the Secretary of Treasury promulgated the Cuban Assets Control Regulations on July 8, 1963. 31 C.F.R. Part 515. The Regulations prohibit all transactions that " involve property in which a foreign country designated under this part, or any national thereof, has at any on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect." 31 C.F.R. Sec. 515.201(a)(1). Cuba is a designated national. 31 C.F.R. Sec. 515.305.

Notwithstanding the general prohibition of Sec. 515.201, Subpart E of

the Regulations provides for the issuance of general licenses upon applications to the Secretary, by which an individual may be permitted access to property otherwise blocked by the Regulations. Persons who do not qualify under one of the general license provisions may apply for a specific licence to be issued at the discretion of the Secretary. 31 C.F.R. Sec. 515.801. Section 515.524, under Subpart E, provides, in part, as follows:

(a) Any bank or trust company incorporated under the laws of the United States, or of any State, territory, or district of the United States, or any private bank subject to supervision and examination under the banking laws of any State of the United States, acting as trustee of any trust administered in the United States or as legal representative of any estate of an infant or incompetent

administered in the United States in which trust or estate one or more persons who are nationals of a designated foreign country have an interest, beneficial or otherwise, or are co-trustees or co-representatives, is hereby authorized to engage in the following transactions:

(1) Payments of distributive shares of the principal or income to all persons legally thereto upon the condition prescribed in paragraph (b) of this section.

II

The plaintiff Margarita Rosa De Cuellar is the sole remaining beneficiary of a United States personal trust establish in 1936 by her mother. The trust consists of 133 "Republic of Cuba External Sinking Fund 4 1/2 % Bearer Bonds" with a face value of $127,000. The bonds were issued in 1937 under an indenture contract

between the Republic of Cuba and Manufacturers Hanover Trust ("MHT"). Under the indenture agreement ("the Agreement"), Cuba was to retire the bond series through annual payments of principal and interest to a sinking fund held by the indenture trustee, MHT, from 1938 through 1977. As trustee, MHT was responsible for redeeming these bearer bonds upon their maturity with the funds accumulated in the sinking fund.

The Agreement also provided that once the bonds matured in 1977, bondholders had six years to redeem the bonds or "the Agent shall return to the Republic the amounts corresponding to the remaining Bonds which, not having been redeemed nor purchased, should have been paid on June 30, 1977 and shall not have been presented for payment." Agreement paragraph 25. Under the Agreement, the bonds were

secured by "the pledge of [Cuba's] good faith and credit," and by "a first preferential right and lien" on 90% of Cuba's tax revenues and economic resources. The pledge of tax revenues and resources was secure "[s]o long as any of the bonds of this issue shall remain outstanding." Agreement paragraph 7. The bonds were payable in full at their maturity in June 1977, however in the event that there were insufficient funds in the sinking fund, MHT was to distribute the funds pro rata. Agreement paragraph 21.

Cuba made its required payments to the sinking fund until December 31, 1960, when it defaulted. On July 8, 1963, the sinking fund was blocked pursuant to the Cuban Assets Control Regulations. As of that date MHT, the paying agent, held $640,098 in the sinking fund. (R3-65-1).

On May 12, 1987, the plaintiff filed a petition with the Secretary seeking a specific license authorizing her to redeem her bonds with her distributive share of the sinking fund. Her request was denied by Richard Newcomb, the Director of the Office of Foreign Assets Control ("OFAC").[2] The Director stated that the sinking fund was blocked because the Republic of Cuba retained a contingent reversionary interest in the fund.[3] He

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[2]. The President has delegated his authority under the Act to the Secretary of the Treasury, Exc. Order No. 9193. 3 C.F.R. 1174, 1175 (1942), who in turn delegated that authority to the Office of Foreign Assets Control. Treasury Department Order No. 128 (Rev. 1, Oct. 15, 1962).

[3]. The indenture contract provides: Six years after the due date of any interest coupons the Agent shall return to the Republic the amounts held for the payment of such interest coupons due on that date which shall not have been presented for payment. Similarly, six years after each redemption date, the Agent shall return to the Republic the

also stated that De Cuellar was in no sense an owner of the sinking fund, but rather was in the position of a secured creditor. Thus the Director concluded that De Cuellar did not qualify for the general license of Sec. 515.524 which acts to release the contents of a trust, otherwise blocked under the Regulations, to persons "legally entitled thereto." (R1-1-Ex. C).

On September 1, 1987, De Cuellar filed suit against James Baker as Secretary of the Treasury, and MHT challenging the Secretary's refusal to (i) issue a specific license unblocking her trust interest; (ii) declare the Regulations inapplicable to her transaction; and (iii) apply General

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amounts corresponding to those bonds called for redemption on that date, which shall not have been presented for payment....
Agreement at paragraph 25.

License Sec. 515.524 of the Regulations to her transaction.[4] In her complaint, De Cuellar sought a declaratory judgment that the Republic of Cuba has no interest in the sinking fund or in the bonds, an order compelling the Secretary to grant the plaintiff a specific license allowing her to redeem her bonds with her pro rata share of the fund, and an order compelling MHT to comply with the license.

On cross-motions for summary judgment, the district court held that the trust fund qualified under 81 C.F.P. Section 515.524 for a general license and that Mrs. De Cuellar was " 'legally entitled' to the distributive share as represented by her bonds." De Cuellar, 686 F.Supp. at 896. The court began with the

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[4]. Nicholas Brady, the new Secretary of the Treasury is automatically substituted for James Baker as defendant. Fed.R.App.P. 43(c)(1).

assumption that the transaction at issue was prohibited by Section 515.201(b) of the Regulations because of Cuba's interest in the sinking fund. Id. at 892. Next, the court rejected the Secretary's argument that the General License Section should apply only to private trusts, states that "[t]he plain words of section 515.524 belie [this] contention.... The sinking fund clearly meets the qualification of a trust administered in the United States." Id. at 893. The court further found that the "philosophy of the regulations does not dictate against application of this general license to this trust." Id at 894. Finally, the court ruled that the Secretary's determination that Mrs. De Cuellar is not "legally entitled" to her distributive share of the fund "requires an unduly restrictive definition of the term... and does not comport with the

spirit of the indenture contract or the legal rights of a holder of a bearer bonds." Id. at 895. The term "legally entitled," the court stated, does not apply only to one who holds legal title, as the Secretary argues, but rather to anyone "who has a legal right, a right 'created or recognized by law.'" Id.(citation omitted).

The district court granted partial summary judgment for Mrs. De Cuellar. Two days later the court determined that the partial summary judgment order rendered the remaining issues mute, and entered final judgment for the plaintiff. The Secretary filed a request for a stay pending appeal and a motion for clarification, stating that it was not clear whether the court had entered an injunction against the Secretary. Mrs. De Cuellar requested a ruling that she was

entitled to full redemption of her bonds, rather than merely her pro rata share of the fund. On April 15, 1988, the district court granted the Secretary's motion for clarification, announced that the court's prior order was a declaratory judgment, and issued a stay pending appeal. On May 20, the court denied Mrs. De Cuellar's motion without prejudice.

[1] Consideration of the district court's grant of summary judgment requires plenary review and application of the same legal standards that bond the district court. Rollins v. TechSouth, Inc., 833 F.2d 1525, 1527 (11th Cir. 1987). Under Fed.R.Civ.P. 56(c), summary judgement is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." Thus the Supreme Court has held that Rule 56(c) mandates the entry of summary judgment against a party who has "failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex Corp. v. Catrett, 477 U.S.317,328,106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

[2] The decision of the OFAC is entitled to great deference, and should be reversed only if arbitrary or capricious. Behering International, Inc. v. Miller, 504 F.Supp. 552,556(D.N.J. 1980). See Parker v. Bowen, 788 F.2d 1512, 1518 (11th Cir.1986). Where Congress has not specifically addressed the precise question at issue, "the question for the court is whether the agency's answer is based on a permissible construction of the

statute." Chevron U.S.A. v. National Res. Def. Council, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). Consequently, "a court may not substitute its own construction of statuary provision for a reasonable interpretation made by the administrator of an agency."Id. at 844, 104 S.Ct. at 2782; see Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct.792, 801, 13 L.Ed.2d 616 (1965).

We will address first, whether Cuba could be held to have an interest in the sinking fund under Sec. 515.201(b); second, whether the plaintiff is entitled to a general license under Sec. 515.524; and third, whether the Secretary's interpretation of the Regulations comports with the purposes of the Act.

III

Because Mrs. De Cuellar's motion for partial summary asserts the applicability

of general license Sec. 515.224, the district court began with the assumption that "the transaction in question is prohibited by the regulations and specifically by section 515.201(b)." De Cuellar argues, however, that we need not reach the issue of whether the general license section applies to this transaction because Cuba has no interest in these assets sufficient to block the sinking fund under Sec. 515.201(b). Thus, she argues, the Secretary should have declared the Regulations wholly inapplicable to her transaction.

[3] Section 515.201(b) of the Regulations provides as follows:

All of the following transactions are prohibited, except as specifically authorized by Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of

regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect;

(1) All dealings in, including, without limitations, transfers, withdrawals, or exportations of, any property or evidences of indebtedness.... (emphasis supplied) The Secretary asserts that Cuba's contingent reversionary interest in the sinking fund (Agreement at paragraph 25) is sufficient to trigger application of this section to the transaction in question.[5] The plaintiff

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[5]. The Secretary also asserts that Cuba has an interest in the sinking fund by virtue of its status as issuer and obligor of the bond issue. See Lary v.

does not dispute that Cuba has a reversionary interest in the sinking fund under the express term of the indenture. She nonetheless argues that the reversionary interest does not extend to that portion of the fund to which she claims to be entitled, and that the Regulations therefore require the Secretary to unblock her distributive share.

We believe that the Secretary's interpretation of Section 515.201 (b) is well supportive by the language of the Agreement, the intent of the parties to the contract, and the relevant case law. In Nielsen v. Secretary of Treasury,

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Republic of Cuba, 643 F.Supp. 194, 196 (S.D.N.Y.1986). Because we find that Cuba's contingent reversionary interest under the indenture contract is an "interest" within the meaning of section 515.201 (b), we express no opinion as to the alternative grounds raised by the Secretary.

424F.2d 933 (D.C.Cir. 1970), the court refused to require the Secretary to unblock the three-fourths of the stock of a Cuban corporation with assets in the United States' owned by the three Cuban refugees. In upholding the secretary's decision, the court stated:

> [I]t is at least presumptively acting reasonable, and without being subject to the charge of arbitrary or tyrannical action, if it assumes that assets owned by a Cuban corporation are indeed assets in which there is a Cuban national interest.
>
> The reasonableness of this approach is heightened by the possibility, perhaps the likelihood, that the foreign country will assert an interest in the assets of corporations organized under its laws.... It is not unreasonable for the American authorities to treat the property of a Cuban corporation as a matter of Cuban

interest and concern, when this and future Cuban governments likely, with some support in fundamental legal principals, to assert an interest.

Id. at 842. The assets in the case before us lie in a sinking fund set up to secure negotiable bonds issued by the Cuban government. We see no reason why the individual shares of that fund are in any sense more divisible than are the separately held shares of a Cuban corporation.

In Behring Intl., Inc., v. Miller, 504 F.Supp. 552 (D.N.J.1980), the Iranian Airforce and Iran Aircraft Industries owed substantial sums to the plaintiff for warehouse services provided in the United States. The parties eventually reached a settlement agreement, under which Iran placed money in a trust account which would be paid to the plaintiff upon

release of certain Iranian property from the warehouse. Any of the money remaining in the account after payment to the plaintiff was to be returned to Iran. Before the Iranian property was released the President issued an executive order blocking all properties and interests of the Iranian government and its instrumentalities. The plaintiff obtained a partial license from the Secretary, but sued to force the Secretary to licence the release of the balance of the money owing to him, alleging that Iran had no interest in the funds held in the trust. The court held that although the interest of Iran in the trust may be "contingent or deminimus" the residual amount, in which Iran has an interest pursuant to the terms of the Agreement, has not been determined. Being undetermined, the amount in which Iran has an interest may not be served from the

plaintiff's interest in the account. The account represents in asset in which both parties have an interest. As such, the account remains blocked in accordance with the Executive Order and the regulations promulgated thereunder.

Behring, 504F.Supp. at 557 (emphasis supplied). Like Nielsen, Behring lends strong support for the decision of the Secretary not to permit the piecemeal unblocking of the sinking fund in which the Republic of Cuba has an undisputed reversionary interest.

Mrs. De Cuellar cites Tagle v. Regan, 643F.2d 1058 (5th Cir.1981) and Real v. Simon, 510 F.2d 557 (5th Cir.1975) As support for the broad proposition that under the Act, "[t]here is no suggestion that assets passing to the Americans should be restrictive in any way." Tagle, 648 F.2d at 1065. In Real, the Secretary

blocked an account which had been established by the deceased Cuban national. The account passed to the descendant's heirs, who were citizens or residents of the United States, by intestate succession. In blocking the account the Secretary relied on 81 C.F.R. Section 515.327 (1974), which defines a "blocked estate of a decedent." This section blocks any estate "in which a designated national has an interest," and goes on to state that "[a] person shall be deemed to have an interest in a decedent's estate if he... was the decedent...." The district court entered judgment in favor of the government. The court of appeals reversed, holding that the government could not validly determine under the Act that a deceased person retains an interest in his estate, and that such a determination "is arbitrary and without

basis in either the language or the purpose of the Trading with the Enemy Act." Real, 510 F.2d at 564. The court was careful to point out that "[t]here is no contention by the United States that the Cuban government has any right or claim to this property, nor is there any assertion that any person in Cuba has any interest in the property." Id. at 561."If neither the government of Cuba nor any person in Cuba has any interest or claim to the blocked property, the Trading with the Enemy Act would be inapplicable...." Id. at 562.

In Tagle, the court again addressed the scope of the Secretary's power to block the passing of a decedent Cuban national's property to American heirs through intestate succession. In Tagle, however, unlike Real, one of the three surviving heirs was a resident of Cuba.

The court held that the plaintiffs, who were the two heirs residing in the United States should be issued a license to unblock their intestate shares. Because the plaintiffs' intestate shares could be "sufficiently separated and identified," the court found that Section 515.525, which under Real authorizes the transfer of the estate of a Cuban national by intestate succession, would allow the plaintiffs to take their shares even though the share of the Cuban heir remained blocked.

Tagle and Real provide relevant discussions of the latitude to be allowed the Secretary in effectuating the goals of the Act. However, we disagree with the district court that these cases reflect a general "trend of current case law" toward the unblocking of accounts in which Cuba retains an interest, De Cuellar, 686

F.Supp. at 894; much less do we find them dispositive of the case before us. Both cases involved estates passing through intestate succession pursuant to specific provision of the Regulations. All of the heirs were known and their shares were fixed by operation of law. By contrast, the plaintiff here seeks to redeem negotiable bearer bonds with funds from an account in which Cuba has an undisputed reversionary interest.[6] Furthermore, it is uncertain how many of the bearer bonds remain outstanding and thus the plaintiff's distributive share with

---

[6]. We note also that were we to order the unblocking of the sinking fund it will be difficult, if not impossible, to determine if particular bearer bonds held by unknown claimants and presented for redemption have been transferred by Cuba or Cuban nationals to American nationals. This scenario is precisely what the Regulations were designed to prevent. See Ferrera v. United States, 424 F.Supp. 888, 890 (S.D.Fla. 1976): Tagle, 643 F.2d at 1068.

respect to the other bondholders is undetermined. Thus, we decline to disturb the Secretary's determination that Cuba has an interest in the sinking funds sufficient to block the entire fund under Section 515.201(b).

IV

[4] Section 515.524 provides a general license for certain trusts and estate in which Cuban nationals have an interest and which are administered by United States banks or trust companies. The Director of OFAC states that section 515.524 has "always been interpreted by Treasury to apply to private trusts and estates. To the best of my knowledge, the Treasury Department has never approved under this section an unblocking of assets... In circumstances resembling those described in plaintiff's complaint." (R2-32 at 5). The district court however

rejected the distinction drawn between private trust and a trust indenture used to secure a public bond issue, holding that "[t}he sinking fund clearly meets the qualification of a trust administered in the United States." De Cuellar, 686 F.Supp. at 893.

The Secretary argues that there are obvious and important differences between private trusts and trust indentures. Among these, while a trustee holds equitably title to the trust corpus, "the debenture indenture trustee does not hold title to, or have possession of, any property." Broad v. Rockwell International Corp., 642 F.2d 929, 941-42 n. 18 (5th Cir.) (en banc), cert. denied, 454 U.S. 965, 102 S.Ct. 506, 70 L.Ed.2d 380 (1981) (quoting American Bar Foundation, Commentaries on Indentures 7-8 (1971)), In this case, the indenture agreement itself demonstrates

that MHT in many respects stand in a position distinct from that in a private trustee. For example, MHT is wholly without discretion over the management of the assets of the sinking fund, and in fact does not hold legal or equitable title to these assets. As indenture trustee, MHT functions largely as a paying agent for the parties to the bond contract and its responsibilities are determined by the terms of the Agreement. As the secretary points out, the ultimate security for the bonds is 90% of Cuba's tax revenues, which security remains in possession of the Republic of Cuba. The reasonableness of the Secretary's interpretation of section 515.524 is further demonstrated by an examination of the entire regulatory scheme concerning the licensing of blocked transactions. When viewed in context, it makes perfect

sense that the Secretary has refused to extend the reach of section 515.524 to an indenture trust such as the one held by MHT.

The Regulation licence certain transactions involving securities blocked because they are owned by Cuban nationals, but they specifically exclude any transaction in which the government of Cuba issued the securities. 31 C.F.R. Section 515.514(e). There is no question that the bonds issued by Cuba in this case are securities.[7] Thus, under the plain meaning of section 515.514(e) Cuba is prohibited from making any payments or

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[7]. Section 515. 203(1) of the Regulations defines "securities" by reference to section 2(1) of the Securities Act of 1933, 15 U.S.C. section 77b(1), which define that term to include any "bond, debenture, [or other] evidence of indebtedness."

transfers on the bonds it has issued since they are securities issued by Cuba.

The plaintiff argues that the general license provision of Section 515.524 pertaining to "certain trusts" applies to the sinking fund and requires the unblocking of her distributive share despite the fact that the bonds she holds are securities within the meaning of section 515.514. We are convinced that the Secretary has properly interpreted the Regulations to reject this argument. To hold that Section 515.524 requires that the Secretary licence the redemption of the bond issue would contradict the plain meaning of section 515.512 in that it would permit the transfer of securities specifically prohibited by section 515.514 merely because Cuba happened to secure the bonds with a trust. Thus, if the district court's interpretation was correct all

transactions involving securities issued by Cuba would be blocked, except for those in which Cuba chose, for whatever reason, to employ a trust to secure them. In this case the Secretary chose to interpret his own regulations to avoid such an anomalous result, and we are unable to agree with the district court that this interpretation is arbitrary and capricious we do not here hold that the sinking fund does not qualify as a trust as a matter of law. However, we do not believe that the distinction drawn by the Secretary between private trusts and trust indentures under section 515.524 is reasonable and thus his refusal to grant the plaintiff a general licence under this section was proper.

V

[5] Finally, we believe that the Secretary's dispositions of the plaintiff's petition is consistent with

the purposes behind the Trading with the Enemy Act and the Cuban Assets Control Regulations. The main purpose of the Regulations have been described as: (1) To deny to Cuba or its nationals hard currency which might be used to promote activities inimical to the interests of the United States; (2) To retain blocked funds for possible use or vesting to the United States should such a decision be made; and (3) To use blocked funds for negotiation purposes in discussions with the Cuban government. Real, 510 F.2d at 563. The first purpose, to deny Cuba hard currency, is fully vindicated by the Secretary's decision because the sinking fund is one in which Cuba has a reversionary interest. As for the Second stated purpose, the continued blocking of the fund preserves the possibility that the United States might vest blocked Cuban

Assets in order to pay the claims of Americans against Cuba. As the second Circuit noted in Sardino v. Federal Reserve Bank of New York, 361 F.2d 106, 112 (2nd Cir.), cert, denied, 385 U.S. 898, 87 S. Ct. 203, 17 L.Ed.2d 130 (1966), "[t]here is a long history of governmental actions compensating our own citizens out of foreign assets in this country for wrongs done them by foreign governments abroad." For example the United Sates negotiated a settlement with Iran in 1981 under which attachments of Iranian assets by United States citizens were suspended. These assets were used to create a fund to compensate parties with claims on the assets. Those whose attachments had been suspended sought relief in the Iran-U.S. Claims Tribunal. This action was upheld in Dames & Moore v. Regan, 458 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981).

The district court rejected the legitimacy of the use of the sinking fund for possible vesting by the United States because it was concerned with the propriety of using the plaintiff's distributive share "to satisfy claims of [other] Americans against the Cuban government." De Cuellar, 686 F.Supp. at 894. While we agree with the broad proposition that the government may not normally use the property of one American Citizen to satisfy the claims of another, Tagle, 648 F.2d at 1066; Real, 510 F.2d at 563, there is little historical basis for fear that this will occur. For example, after World War II the United States vested private Bulgarian, Hungarian, and Rumanian property pursuant to settlements with those countries. The settlement provided that debts owed to certain categories of United States citizens be

paid first. See 22 U.S.C. section 1631g(a). Payments of general claims against these countries were allowed out of the remaining funds. See 22 U.S.C. section 1641a et seq.

Finally, the continued blocking of the sinking fund and Cuba's contingent interest in it provides an important bargaining tool for negotiations with the Cuban government. See Dames & Moore v. Regan, 453 U.S. 654, 678, 101 S.Ct. 2972, 2988, 69 L.Ed.2d 918 (1981). As the Supreme Court explained in Dames & Moore, "[n]ot infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are "sources of friction" between the two sovereigns. To resolve these difficulties, nations have often entered into agreements acting the claims of their respective nationals." Id. at

679, 101 S.Ct. at 2986 (citation omitted).[8] It is the opinion of the Secretary that the best hope that the bondholders and others of Cuba's creditors have of collecting on debts owing to them lies in the execution of a single negotiated settlement between the United States and Cuba. The OFAC Director explained that it has been a consistent policy to keep "all Cuban assets blocked, pending a decision or settlement regarding all claims against Cuba. Eventually, all blocked assets will be disposed of in accordance with an overall plan that may

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[8]. See also Nielson, 424, F.2d at 840 ("The freeze on transfer of Cuban assets was not necessarily, however, a freeze of those assets.... [T]he freeze of the assets of a foreign country may not only promote economic isolation in the present, but also constitute meaningful planning for the future, by preserving the assets involved for possible use in some satisfaction of American claims against the country involved....").

provide for the claims of individual creditors of Cuba." (R2-32 at 5,6).

The district court stated that the plaintiff's interest could nonetheless be satisfied "without impeding or interfering with foreign policy." De Cuellar, 686 F.Supp. at 895. Section 515.524(2)(b) provides a mechanism by which any funds due Cuba or Cuban nationals may be paid into a blocked account. Thus, the district court suggests that the plaintiff, and presumably other non-Cuban nationals, could be granted individual licenses to redeem their bonds without effectively unblocking the entire fund. We believe, however, that the Secretary's chosen approach of holding all assets until a single, comprehensive settlement with the Cuban government can be reached is entitled to great deference from this court. Bowles v. Seminole Rock & Sand

Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945).[9] Were the Secretary forced to follow the course prescribed by the district court, "[t]he sinking fund and other similar assets could be dissipated to such a degree that they could become useless as a tool for negotiating with the Cuban government." (R2-55 at 2). Thus, we find that the

---

[9]. Under the plain wording of the Agreement, were Mrs. De Cuellar granted a license to unblock her interest in the sinking fund, she would be entitled only to her pro rata share. The Agreement expressly addresses the contingency of insufficient funds by providing for the redemption of outstanding funds upon maturity "in full if [the] funds suffice therefor, otherwise pro rata." Agreement paragraph 21 (emphases supplied). Of the $85 million face amount of the bond series, the sinking fund currently contains about $1.5 million. (R3-65-2). Thus, by unblocking the sinking fund rather than using Cuba's interest in the fund to negotiate a favorable comprehensive settlement, the bondholders' pro rata shares would comprise no more than a mere fraction of their respective claims against the fund.

decision of the Secretary is fully consistent with the furtherance of the goals of the Act as implemented by the Regulations.

Accordingly, the district court's order granting partial summary judgement for the plaintiff, and the final judgement for the plaintiff are reversed, and the matter is remanded to the district court for entry of judgment in favor of the defendants.

REVERSED, REMANDED AND RENDERED.

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES

NO. A-417

Margarita Rosa De Cuellar,

Petitioner

v.

Nicholas F. Brady, Secretary of the Treasury, and Manufacturers Hanover Trust Company, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 18, 1990.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme Court of the United States

Dated this 29th
day of November, 1989.

APPENDIX "E"

CONVENIO

CELEBRADO EN 18 DE ABRIL DE 1938 ENTRE
LA REPUBLICA DE CUBA
Y
THE MANUFACTURERS TRUST COMPANY
SOBRE EMISION DE OCHENTA Y CINCO
MILLONES DE PESOS EN BONOS DE LA
DEUDA EXTERIOR DE LA REPUBLICA DE
CUBA AL CUATRO Y MEDIO POR
CIENTO (4 1/2%) 1937-1977

EXHIBIT "B"

AGREEMENT

EXECUTED APRIL 18, 1938 BY
THE REPUBLIC OF CUBA
AND
THE MANUFACTURERS TRUST COMPANY
REGARDING THE ISSUE OF EIGHTY-FIVE
MILLION DOLLARS OF FOUR AND ONE-
HALF PER CENT. (4 1/2%) BONDS OF THE
EXTERNAL DEBT OF THE REPUBLIC OF
CUBA, 1937-1977

EXHIBIT "B"

TWENTY-FOURTH

From time to time the Agent shall return to the Republic after cancelling the same, the interest coupons paid and the Bonds purchased and retired or redeemed. Said Bonds and coupons when cancelled by the Agent shall cease to enjoy any and all of the benefits of this Agreement and all responsibility of the Republic with respect to the same shall also cease. Said Bonds may note be reissued by the Republic nor shall the Republic issue new bonds in them, so that the cancellation of such Bonds shall automatically diminish the total amount of the bonds outstanding.

TWENTY-FIFTH

Six years after the due date of any interest coupon the Agent shall return to the Republic the amounts held for the payment of such interest coupons due on that date which shall not have been presented for payment. Similarly, six years after each redemption date, the Agent shall return to the redemption on that date, the Agent shall return to the Republic the amounts corresponding to those Bonds called for redemption on that date, which shall not have been presented for payment, and six years after June 30, 1977, the Agent shall return to the Republic the amounts corresponding to the remaining Bonds which, not having been redeemed nor purchased, should have been paid on June 30, 1977 and shall not have been presented for payment. Nevertheless, before returning such moneys, the Agent may cause to be published at the expense

of the Republic a notice to the effect that such moneys remain unclaimed and that, after a date specified therein, the moneys will be returned to the Republic unless previously claimed. This notice shall b e published once only in the manner set forth in Article Eighteenth and shall be sent by mail in the same manner to the registered holders of said Bonds. If the coupons or Bonds are not presented for payment on or before the date set forth in the notice the Agent shall return said moneys to the Republic, after which the holders of such Bonds and coupons shall not look to the Agent for payment.

(2)

No. 90-56

FILED
AUG 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

MARGARITA ROSA DE CUELLAR,

Petitioner,

versus

NICOLAS F. BRADY, as SECRETARY OF THE TREASURY OF THE UNITED STATES and MANUFACTURERS HANOVER TRUST COMPANY,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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I hereby certify that the following named parties have an interest in the outcome of this litigation:

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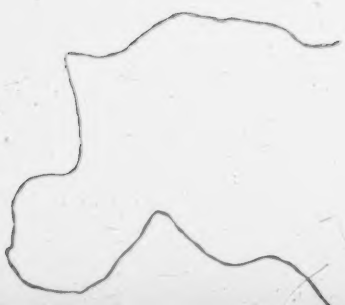

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JURISDICTION

Although this Court has discretionary jurisdiction when considering a Petition for Writ of Certiorari, this case presents none of the characteristics described by Supreme Court Rule 10.1 as reasons for granting a Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In 1937, the Republic of Cuba issued the subject "Republic of Cuba External Sinking Fund 4 1/2% bonds," with the total face value of this bond series being $85,000,000.00. These were bearer bonds negotiable by simple delivery, and they were registered securities which were traded on both the New York and Havana Stock Exchanges. Pursuant to an Indenture Agreement ("the Agreement") between Cuba and Manufacturers Trust Company, Manufacturers Trust Company was an agent charged with paying interest and redeeming these bearer bonds upon instruction from Cuba with funds periodically provided by Cuba. Respondent Manufacturers Hanover Trust Company ("MHT") is the successor in interest to Manufacturers Trust Company. Cuba made periodic payments to MHT until December 31, 1960, when Cuba defaulted on its payments. Since the time of its initial default, Cuba has failed to make any payments to MHT.

On July 8, 1963, the funds held by MHT were blocked by the United States pursuant to the Cuban Assets Control Regulations. 31 C.F.R. §§ 515.101-.901 (1989). As of that date, MHT held approximately $640,098.00 in

accounts for this Indenture. MHT's investment of these funds in the manner required by the Cuban Assets Control Regulations, 31 C.F.R. § 515.205, has increased the funds held by MHT for this Indenture to approximately $1,500,000.00. MHT is under the belief, based upon information available to it at the time of Cuba's default, that the outstanding bonds may have a face value of up to $44,059,000.00. It is impossible, however, to determine the amount of outstanding bonds now because MHT has no knowledge as to whether Cuba has independently redeemed any of these bonds.

The Petitioner claims to hold 127 of these bonds with a face value of $127,000. On May 12, 1987, Petitioner applied to the Department of Treasury's Office of Foreign Assets Control ("the Treasury") for a license to release sufficient money from the fund to redeem her bonds. This request was denied based on the determination that such a license would be illegal under the Cuban Assets Control Regulations. Petitioner then filed the underlying action against the Secretary of the Treasury and MHT seeking to compel the Treasury to issue the license and seeking a declaratory judgment that Cuba has no interest in the funds and/or that Cuba's interest is so minimal as not to disturb the policy behind the Trading With the Enemy Act. Petitioner also sought a declaratory judgment that the general license provision of 31 C.F.R. § 515.524 was directly applicable to her transaction. Petition, pp. 5-7. On cross motions for summary judgment, the trial court rejected the Treasury's interpretation of its regulations and granted Petitioner partial summary judgment stating that she was "legally entitled to her distributive share as represented by her bonds." *De Cuellar v. Baker*, 686 F.

Supp. 890, 896 (S.D. Fla. 1988). The trial court determined the remaining issues were moot and entered a final judgment for Petitioner. This was appealed to the United States Court of Appeals for the Eleventh Circuit which reversed the trial court and reaffirmed the Treasury's conclusion that the issuance of the requested license would violate the Cuban Assets Control Regulations.

REASONS THE PETITION SHOULD BE DENIED

I. THERE IS NO CONFLICT WITH DECISIONS OF OTHER COURTS

Contrary to Petitioner's claim, the decision below is not in direct conflict with *Real v. Simon*, 510 F.2d 557 (5th Cir. 1975), and *Tagle v. Regan*, 643 F.2d 1058 (5th Cir. 1981). In fact, the opinion below is entirely consistent with the holdings in *Real* and *Tagle*. The differing outcomes result from crucial factual differences in these cases.[1]

In *Real*, the government would not release the assets of a deceased Cuban national's estate, even though all of his heirs were American citizens or lawfully admitted resident claims, because of the decedent's interest in his estate. No living person in Cuba, however, had any interest in the assets at issue. The resolution of *Real* was determined

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[1] Petitioner attempts to create a conflict by stating "the Court found that these cases *Real* and *Tagle* essentially stand for 'the broad proposition that under the act, there is no suggestion that assets passing to Americans should be restricted in any way.' " Petition, p. 21. In fact, the Court below merely stated that Petitioner cited *Tagle* and *Real* for that broad proposition. *See* Appendix to Petition, p. 89.

by the court's finding that "[t]here is no contention by the United States that the Cuban Government has any right or claim to this property, nor is there any assertion that any person in Cuba has any interest in the property." *Real*, 510 F.2d at 561. *Tagle* presented a case where one of three heirs to the estate of a deceased Cuban national was a resident of Cuba. In that case, the court concluded the United States should issue a license to unblock the American heirs' share of the estate because it could be sufficiently identified and separated from the interests of the Cuban resident. *Tagle*, 643 F.2d at 1063-64. The facts in the instant case, however, mandate a different result because the Cuban government has an interest in the blocked fund, and because it is not possible to identify and separate any interest Petitioner might have in the fund from Cuba's interests.[2]

II. THE CASE BELOW WAS PROPERLY DECIDED

Through a reverter clause in the Indenture Agreement, Cuba retains an interest in the blocked funds. This conclusion was reached by both the Eleventh Circuit and

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[2] Since these bonds were traded as securities on both the New York and Havana Stock Exchanges, it can be reasonably expected that there are Cuban nationals possessing these bonds. As the Eleventh Circuit noted, in the event the fund is unblocked, "it will be difficult, if not impossible, to determine if particular bearer bonds held by unknown claimants and presented for redemption have been transferred by Cuba or Cuban nationals to American nationals. This scenario is precisely what the regulations were designed to prevent." Appendix to Petition, p. 93 (citing Ferrera v. United States, 424 F.2d 888, 890 (S.D. Fla. 1976); *Tagle*, 643 F.2d at 1068).

by the United States District Court for the Southern District of New York, the only other court known to have decided the issue of Cuba's interest in this specific fund. *Lary v. Republic of Cuba*, 643 F. Supp. 194, 196 (S.D.N.Y. 1986). Furthermore, in an analogous case, it was held that the Treasury did not abuse its discretion by denying an application for a license to release funds from a trust in which Iran had a residual interest, even if "[t]he 'interest' of Iran in the funds held in the subject trust account may be contingent or *de minimus*." *Behring Int'l., Inc. v. Miller*, 504 F. Supp. 552, 557 (D.N.J. 1980). The Treasury's interpretation of its own regulations is entitled to deference and is controlling unless it is plainly erroneous or inconsistent with the purposes of the regulation. *See United States v. Larionoff*, 431 U.S. 864, 872-73 (1977). As illustrated in the appellate decision below, the Treasury's interpretation of its regulations in this case is completely consistent with the purpose of the regulations. Appendix to Petition, pp. 99-107.

The Eleventh Circuit properly disregarded Petitioner's contention that she is entitled to a license under Section 515.524 of the Cuban Assets Control Regulations. There is a significant difference between the type of private trust envisioned by that regulation and a trust indenture such as the one established with MHT. As stated by the Court below "while a trustee holds equitably title to the trust corpus, 'the debenture indenture trustee does not hold title to, or have possession of, any property.' " Appendix to Petition, p. 95 (quoting *Broad v. Rockwell Int'l., Corp.*, 642 F.2d 929, 941-42 n.18 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981)). Furthermore, to interpret Section 515.524 otherwise would contradict the plain

meaning of Section 515.512 by permitting a transfer of securities specifically prohibited by Section 515.514 merely because Cuba happened to secure the bonds with a trust. *See* Appendix to Petition, pp. 98-99.

Ultimately, the relief requested by Petitioner is, as a practical matter, impossible. There is probably no question that the fund now contains only a small fraction of the amount that would be necessary to redeem all outstanding bonds. Paragraph 21 of the Agreement specifically states that in such a situation the assets should be distributed on a pro rata basis. Appendix to Petition, p. 74. In order to determine the Petitioner's pro rata share, however, MHT would have to know the total number of outstanding bonds. This is probably impossible because there is no way for MHT to determine whether the Cuban government has redeemed any outstanding bonds remitted by Cuban nationals.

III. NO IMPORTANT FEDERAL QUESTION IS PRESENTED WARRANTING THIS COURT'S ATTENTION

The issues Petitioner seeks to have this Court address necessarily rest on the interpretation of one specific contract, the Agreement between Cuba and MHT. The interpretation of this contract has little bearing outside the scope of this case, and it does not present an issue of sufficient public importance to merit this Court's consideration. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) (certiorari should not be granted merely for benefit of particular litigants).

IV. THE PETITION IS UNTIMELY

Pursuant to an extension of time granted by this Court, the deadline for Petitioner to file her petition was January 18, 1990. Although a petition was served on January 17, 1990, it did not comply with the printing requirements of Supreme Court Rule 33. That rule provides that a document not meeting these requirements shall not be accepted for filing, but the filing "shall not thereby be deemed untimely *provided that new and proper copies are promptly substituted*." Sup. Ct. R. 33.7 (emphasis added). The subject petition was not resubmitted in proper form until July 2, 1990, almost half a year after the January 18, 1990, deadline. Petitioner thus failed to promptly substitute the defective petition with one in compliance with this Court's rules, and this petition should be denied as untimely.

CONCLUSION

The petition for writ of certiorari should be denied because the petition is untimely, the underlying decision was proper and does not conflict with decisions of other circuits, and because no important federal question is presented worthy of this Court's review.

Respectfully submitted,

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No. 90-56

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARGARITA ROSA DE CUELLAR, PETITIONER

v.

NICOLAS F. BRADY, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Secretary of the Treasury acted arbitrarily and capriciously by denying petitioner a license under the Cuban Assets Control Regulations, 31 C.F.R. Pt. 515, for the redemption of bearer bonds issued by Cuba.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

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MARGARITA ROSA DE CUELLAR, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 66-107) is reported at 881 F.2d 1561. The opinion of the district court (Pet. App. 41-65) is reported at 686 F. Supp. 890.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1989. On November 29, 1989, Justice Kennedy granted an extension to January 18, 1990, in which to file a petition for a writ of certiorari, and the petition was filed on that date. Pet. App. 108. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 5(b) of the 1917 Trading With the Enemy Act (TWEA), 50 U.S.C. App. 5(b), authorizes the President, in times of national emergencies, to impose embargoes on transactions between persons subject to the jurisdiction of the United States in countries designated as hostile by the President. In 1962, President Kennedy declared a national emergency and placed an embargo on Cuba. Pursuant thereto, the Treasury Department's Office of Foreign Assets Control promulgated the Cuban Assets Control Regulations. The regulations prohibit transactions with either the Cuban government or Cuban nationals, 31 C.F.R. 515.201(a), unless such transactions fall within the scope of either a general or specific licensing provision.[1]

2. Petitioner, a Cuban national, is the sole beneficiary of a trust established by her mother in 1936. The trust con-

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[1] As originally enacted, the TWEA authorized the President to act only in "time of war." Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (codified as amended at 50 U.S.C. App. 1 *et seq.*). The Act was amended in 1933 to expand the President's powers to deal with emergencies in peacetime. Act of Mar. 9, 1933, ch. 1, 48 Stat. 1. In 1977, Congress amended Section 5(b) to limit the President's authority under the TWEA to "time[s] of war" or during a "period of national emergency." 50 U.S.C. App. 5(b)(1).

In order to continue economic measures taken pursuant to Section 5(b) prior to 1977, Congress grandfathered the existing embargoes. The President may extend such embargoes for one-year periods upon determining that the extension "is in the national interest of the United States." Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101(b), 91 Stat. 1625. Since the TWEA was amended in 1977, the President has determined that a continued embargo of Cuba is in the national interest. See 53 Fed. Reg. 35,289 (1988); 52 Fed. Reg. 33,397 (1987); 51 Fed. Reg. 30,201 (1986); 50 Fed. Reg. 36,563 (1985); 49 Fed. Reg. 35,927 (1984); 48 Fed. Reg. 40,695 (1983); 47 Fed. Reg. 39,797 (1982); 46 Fed. Reg. 45,321 (1981); 45 Fed. Reg. 59,549 (1980); 44 Fed. Reg. 53,153 (1979); 43 Fed. Reg. 40,449 (1978).

sists of 133 "Republic of Cuba External Sinking fund 4½% Bearer Bonds," with a face value of $127,000. Cuba issued the bonds in 1937 under an indenture agreement with Manufacturers Hanover Trust Company (Manufacturers Hanover), which called for Cuba to retire the bonds through annual payments to a sinking fund from 1938 through 1977. Manufacturers Hanover, as trustee, was responsible for paying off the principal upon the bonds' maturity with funds accumulated for that purpose in the sinking fund. Under the indenture agreement, once the bonds matured in 1977, bondholders had six years to redeem the bonds and Manufacturers Hanover was required to return any unredeemed funds to Cuba. By its terms, the bond issue constituted irrevocable contractual obligations of Cuba, "secured by the pledge of [its] good faith and credit," and by "a first preferential right and lien" on 90% of Cuba's tax revenues and economic resources. Pet. App. 74. The pledge of tax revenues and resources was secure "[s]o long as any of the bonds of this issue shall remain outstanding." *Ibid.* The bonds were payable in full at their maturity in June 1977, although in the event that there were insufficient funds in the sinking fund, Manufacturers Hanover was directed to distribute the funds pro rata. Cuba made the required payments into the sinking fund until December 31, 1960, when it defaulted. On July 8, 1963, the sinking fund was blocked pursuant to the Cuban Assets Control Regulations. Pet. App. 72-74.

In May 1987, petitioner filed a petition with the Secretary of the Treasury for a specific license to unblock the funds represented by the bonds issued by Cuba. Pet. App. 75. The Secretary, through the Office of Foreign Assets Control, denied this request in July 1987.[2] Pet. App. 28-40.

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[2] In 1942, through Executive Order No. 9193, 3 C.F.R. 1174 (1938-1943 Comp.), the President delegated his authority under TWEA

The director of the Office of Foreign Assets Control explained that the sinking fund was blocked under Section 515.201(b) of the Cuban Assets Control Regulations, 31 C.F.R. 515.201(b), because under the indenture agreement between the Republic of Cuba and Manufacturers Hanover, Cuba retained a reversionary interest in the funds held by Manufacturers Hanover.[3] Pet. App. 31-32. The Director also stated that it would be inappropriate to unblock the sinking fund held by Manufacturers Hanover as to petitioner when it was apparent that there were potentially numerous unknown bondholders. *Ibid.* He further stated that petitioner was not technically an owner of the funds, but was a secured creditor and, accordingly, was not "legally entitled" to the trust funds as provided by 31 C.F.R. 515.524(a)(1). Pet. App. 34-35.

3. Petitioner then filed suit against the Secretary of the Treasury and Manufacturers Hanover. On cross-motions for summary judgment, the district court granted partial summary judgment for petitioner. Pet. App. 41-65. The court held that the trust fund qualified under 31 C.F.R. 515.524 for a general license, and that petitioner was legally entitled to "the distributive share" represented by her bonds. Pet. App. 41-65. The court also determined that issuing a license to petitioner was not inconsistent with the

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to the Secretary of the Treasury, who subsequently delegated that authority to the Office of Foreign Assets Control. Treasury Dep't Order No. 128 (Rev. 1, Oct. 15, 1962). See *Regan* v. *Wald*, 468 U.S. 222, 226 n.2 (1984).

[3] Section 515.201 prohibits transactions, unless specifically authorized, in which Cuba has "at any time on or since [July 8, 1963] had any interest of any nature whatsoever, direct or indirect." 31 C.F.R. 515.201(b). Section 515.201 specifically prohibits "[a]ll dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property." 31 C.F.R. 515.201(b)(1).

policy concerns underlying the blocking regulations. *Id.* at 56-59.

4. The court of appeals reversed. Pet. App. 66-107. It held that Cuba's reversionary interest in the sinking fund was sufficient to block that entire fund, and that the Secretary's decision not to allow piecemeal unblocking of the sinking fund in order to enable petitioner to receive her distributive share was "well supported by the language of the Agreement, the intent of the parties to the contract, and the relevant case law." Pet. App. 85; *id.* at 85-89. The court of appeals disagreed with the district court that the funds could be unblocked pursuant to a general license for certain trusts under Section 515.524. The court held that the distinction drawn by the Secretary between private trusts, which can be licensed, and trust indentures, which cannot, was "reasonable" and consistent with "the entire regulatory scheme concerning the licensing of blocked transactions." Pet. App. 96. The court of appeals also concluded that the bonds issued by Cuba were securies and, thus, were also blocked under Section 515.514(e), which specifically excludes any transaction in which the government of Cuba issued the securities. Pet. App. 97-98. Finally, the court of appeals held that the Secretary's action was fully consistent with the goals of the TWEA and its implementing regulations. *Id.* at 106-107.[4]

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[4] The court held that blocking the sinking fund (1) denies Cuba the use of hard currency to promote activities adverse to United States interests; (2) preserves the possibility that the United States might vest ~~blocked~~ Cuban assets in order to pay the claims of United States citizens or residents against Cuba, and (3) provides an "important bargaining tool for negotiations with the Cuban government." Pet. App. 100-103. The court disagreed with the district court's view that unblocking of the sinking fund was necessary to prevent the government from using the funds to satisfy the claims of United States citizens, stating that there was "little historical basis for fear that this

ARGUMENT

1. Petitioner argues that Cuba does not have a sufficient interest in the sinking fund to justify applying the blocking regulations in her case. Pet. 15-16. That claim lacks merit.

The indenture agreement provided that Manufacturers Hanover must return to Cuba any funds not claimed by bondholders within six years of the bonds' maturity date. Pet. App. 73. Cuba therefore has a reversionary interest in the fund, as petitioner concedes, Pet. 22, and that reversionary interest is an "interest" for purposes of the Cuban Assets Control Regulations. See 31 C.F.R. 515.312 ("The term 'interest' when used with respect to property shall mean an interest of any nature whatsoever, direct or indirect."); *Behring Int'l, Inc.* v. *Miller,* 504 F. Supp. 552, 557 (D.N.J. 1980) (remainder interest, even if "contingent or *de minimis,*" was a sufficient interest to warrant blocking of trust account established by Iran for benefit of United States company to pay for warehouse services). See also *United States* v. *Quong,* 303 F.2d 499, 503 (6th Cir.) ("interest" under the TWEA must be construed broadly), cert. denied, 371 U.S. 863 (1962); *United States* v. *Broverman,* 180 F. Supp. 631, 636 (S.D.N.Y. 1959) (same). Any such interest under the TWEA is sufficient to block the entire sinking fund account. See 50 U.S.C. App. 5(b)(1)(B) (the President may "prevent or prohibit * * * any * * * transactions involving * * * any property in which any

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will occur." *Id.* at 102. Moreover, the court found that a partial unblocking of the sinking fund could dissipate the sinking fund to such an extent that it would become a useless negotiation tool with the Cuban government. *Id.* at 105-106. Significantly, the court concluded that the Secretary's decision to hold all assets until a single, comprehensive settlement could be reached was "entitled to great deference." *Id.* at 105.

foreign country * * * has any interest").[5] Cuba's reversionary interest in the sinking fund also easily fits within the definition of "property" in the blocking regulations. See 31 C.F.R. 515.203(f).[6] Accordingly, the court of appeals correctly held that Cuba has a sufficient interest in the sinking fund to trigger the blocking regulations.

Petitioner argues that the decision below conflicts with the Fifth Circuit's decisions in *Real* v. *Simon,* 510 F.2d 557 (1975), and *Tagle* v. *Regan,* 643 F.2d 1058 (1981), but those cases are distinguishable. As the court of appeals explained, Pet. App. 92-94, neither case involved property in which Cuba retained a reversionary interest. Both cases involved estates of Cuban nationals that passed by intestate

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[5] The Secretary has long recognized (and has advised Congress) that Cuban government bonds and the sinking funds that secured them are considered "interests" of Cuba and are blocked. In its 1964 census of blocked Cuban assets, the Office of Foreign Assets Control (OFAC) specifically referred to several Cuban bond issues (of which the 1937-1977 series is the most important). OFAC estimated that the Cuban government had realizable assets of $14.6 million, of which $12.3 million was subject to counter-claims by New York banks. Of the remaining $2.3 million, OFAC calculated that more than $670,000 was money held in the United States in "bond sinking funds." *Claims of U.S. Nationals Against the Government of Cuba: Hearings on H.R. 10327, etc. Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs,* 88th Cong., 2d Sess. 161 (1964). A second Treasury census again counted the 1937-1977 bond series as Cuban assets. Office of Foreign Assets Control, U.S. Dep't of the Treasury, *Blocked Foreign Assets in the United States: Summary Report of 1983-84 Census of Blocked Property* (1985).

[6] Section 515.203(f) states in part that " 'property' includes gold, silver, bullion, currency, coin, credit, securities (as that term is defined in section 2(1) of the Securities Act of 1933, as amended), bills of exchange, notes, drafts, acceptances, checks, letters of credit, book credits, debts, claims, contracts, negotiable documents of title, mortgages, liens, annuities, insurance policies, options and futures in commodities, and evidences of any of the foregoing."

succession to United States residents. And in both cases the heirs were known, and their respective shares were determined by operation of law.

In *Real,* the issue was whether the Secretary could block an account established by a deceased Cuban national from passing by intestate succession to the decedent's heirs, who were citizens or residents of the United States. The court held that the decedent's account could not be blocked because a decedent does not retain a legal interest in his own estate. 510 F.2d at 564. In *Tagle,* the decedent's estate passed to her three children, two of whom resided in the United States. The court held that where the interests of United States residents in the decedent's estate could be "sufficiently separated and identified," the residents were entitled to a license under Section 515.525. 643 F.2d at 1063-1064. By contrast, in this case Cuba has a reversionary interest in the sinking fund. In addition, since it is uncertain how many of the bearer bonds remain outstanding, "[petitioner's] distributive share with respect to the other bondholders is undetermined." Pet. App. 93-94. Neither *Real* nor *Tagle* requires the unblocking of an asset in which Cuba retains an undivided and undetermined interest.

There is also no merit to petitioner's contention that the Secretary acted unreasonably in refusing to unblock partially the sinking fund to allow petitioner to be paid a proportionate share of the assets. Pet. 22-25. As the lower courts have consistently recognized, it is no defense that United States citizens also have interest in the blocked property. See *Nielsen* v. *Secretary of the Treasury,* 424 F.2d 833, 839 (D.C. Cir. 1970) (court upholds blocking of account established by Navy to pay Cuban refugees who held three-quarters of the stock of a Cuban corporation that had supplied water to the United States base at Guantanamo Bay, finding "no constitutional requirements en-

titling the non-Cuban shareholders to withdraw a proportionate share of the blocked assets of the Cuban corporation"); *Behring Int'l, Inc.* v. *Miller,* 504 F. Supp. at 557-558.[7]

2. Petitioner also contends that she is entitled to receive a general license under 31 C.F.R. 515.524 in order to obtain her portion of the sinking fund. Section 515.524 provides a general license for certain trusts and estates in which Cuban nationals have an interest and which are administered by United States banks or trust companies. Petitioner argues that the literal language of Section 515.524 applies to "any trust administered in the United States," Pet. 18, and includes the agreement here.

As the court of appeals noted, Pet. App. 94, the Secretary has interpreted this regulation to apply only to private trusts, not to all types of trusts, loosely defined, created to service corporate or Cuban government debt financing. That interpretation, as the court of appeals held, Pet. App. 95-99, is a reasonable one, since there are material

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[7] Petitioner argues, Pet. 15-16, that the sinking fund should be unblocked because "there is no evidence (i) that Cuba has ever had an interest in the De Cuellar Estate (ii) that [petitioner], as sole surviving heir, has ever been a 'national' or 'designated national' of Cuba or (iii) that [petitioner] intends to use her share of the Sinking Fund for or on behalf of The Cuban Government." Those arguments are beside the point. First, the Secretary has never taken the position that Cuba had an interest in the De Cuellar trust administered by Citibank. The Secretary's concern has always been with the sinking fund, in which Cuba does have an interest. Second, that petitioner is neither a national or a designated national of Cuba is irrelevant. Petitioner is forbidden from redeeming her bonds from the sinking fund because the fund is one in which Cuba has an interest. Third, while the government has no reason to believe that petitioner would use her portion of the sinking fund on behalf of the Cuban government, blocking the funds serves the three purposes of the Cuban Assets Control Regulations, as the court of appeals recognized, Pet. App. 100-107.

differences between private trusts and trust indentures.

To begin with, as the court of appeals noted, Pet. App. 95, while a trustee holds equitable title in the trust corpus in a private trust, "the debenture indenture trustee does not hold title to, or have possession of, any property." *Broad* v. *Rockwell Int'l Corp.*, 642 F.2d 929, 941-942 n.13 (5th Cir.) (en banc) (quoting American Bar Association, Commentaries on Indentures 7-8 (1971)), cert. denied, 454 U.S. 965 (1981). "The modern corporate trust deed is in many respects *sui generis* * * * [It] retains characteristics of a trust, but it is distinguished from a real or true trust, by the fact that the corpus—the incumbered property—frequently remains in the possession and under the control of the borrower." Payne, *Exculpatory Clauses in Corporate Mortgages and Other Instruments,* 19 Cornell L.Q. 171, 171 (1934). In addition, under a trust indenture, the trustee is typically a corporate entity that "perform[s] certain ministerial tasks connected with the normal operation of the debentures" on behalf of "a great number of parties." *Broad,* 642 F.2d at 941.[8] Moreover, the distinction between private trusts and trust indentures was recognized by Congress in the Trust Indenture Act of 1939, 15 U.S.C. 77aaa *et seq.* That Act, adopted the year after Cuba and Manufacturers Hanover signed the sinking fund agreement, regulates indentures that must be registered under the Securities Act of 1933, 15 U.S.C. 77a

[8] Some courts have held that the indenture trustee is not properly denominated a "trustee," whose common-law duties go beyond those in the trust agreement, but is more properly called a "stakeholder," whose duties and obligations are exclusively defined by the terms of the indenture agreement. See *Meckel* v. *Continental Resources Co.*, 758 F.2d 811, 816 (2d Cir. 1985); *Broad,* 642 F.2d at 941-942 n.13; *Hazzard* v. *Chase Nat'l Bank,* 159 Misc. 57, 83-84, 287 N.Y.S. 541, 570 (Sup. Ct. 1936), aff'd mem., 257 A.D. 950, 14 N.Y.S.2d 147 (1939), aff'd mem., 282 N.Y. 652, 26 N.E.2d 801, cert. denied, 311 U.S. 708 (1940).

et seq. "Indenture" is defined as "any mortgage, deed of trust, trust or other indenture, or similar instrument or agreement * * * under which securities are outstanding or are to be issued." 15 U.S.C. 77ccc(7). Although the sinking fund would have been specially exempted from the Trust Indenture Act of 1939 only because it was issued by a foreign government, see 15 U.S.C. 77ddd(a)(6), such agreements are generally subject to that Act.

As the court of appeals observed, the sinking fund agreement itself demonstrates that Manufacturers Hanover "in many respects stand[s] in a position distinct from that in a private trustee." Pet. App. 96. Manufacturers Hanover holds neither legal nor equitable title to the asset, and it has no discretion over the management of the sinking fund. The company serves only a depository function for the sinking fund, and it disburses the funds to the bondholders according to the indenture agreement. Significantly, the real security for the bonds is Cuba's tax revenues. That security, of course, was never entrusted to Manufacturers Hanover, and remains in Cuba's hands.

In any event, 31 C.F.R. 515.514 prohibits the transfer of "securities," which includes the bonds in this case, as the court of appeals noted, Pet. App. 97-98. The fact that the bonds were secured by a trust is immaterial.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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